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Of Compelling Interest: The Intersection of Religious Freedom and Civil Liability in the Portland Priest Sex Abuse Cases

When a tort plaintiff accuses a church of having harbored a child molester, is the church's cry of "religious liberty" opportunistic hypocrisy or a rallying of core First Amendment principles? That question is central to the issue of liability, but, more fundamentally, it forces a reexamination of the essence of the Establishment and Free Exercise Clauses. Long before the Archdiocese of Portland filed for bankruptcy protection under Chapter 11[1] in 2004, nationwide litigation involving child sexual abuse by priests of the Roman Catholic Church raised interesting

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[1] 11 U.S.C. §§ 1101-1174 (2000).

and subtle issues related to religious liberty.[2] While an appeal to religious liberty in the context of betrayal and abuse is bound to raise eyebrows, priest sex abuse cases inevitably lead to defenses and arguments centered on religious liberty. These arguments arise from the very nature of civil litigation with its broad and systematic discovery of the workings of a religious institution, the secular standards juries use to evaluate the actions of religious organizations, and the potential large compensatory or punitive damage awards against a church.

The inevitability of religious liberty claims has proven particularly true in Oregon. After the Oregon Supreme Court in *Fearing v. Bucher*[3] subjected the Church to a kind of strict or vicarious liability for its priests' sexual abuse of children,[4] the Church's most significant legal defenses have stemmed from its constitutional status as a religious entity. This Article seeks to provide an overview of the unique issues raised by these cases with a particular view toward the interaction between religious liberty and civil liability.

This Article also uses a "classic case" of priest sexual molestation of a minor as a template for illustration and analysis, occasionally adding or changing facts for illustration. Part I examines the various policy reasons for imposing liability on a church for the abuse of minors by its priests, its "religious,"[5] and its other employees.[6] In Part II, we examine in some detail the realities of child abuse, including the policy considerations for an extended statute of limitation in these cases. In Part III, the Article looks at actual theories and principles of liability used against the Church and discusses the defenses, assertions, and claims—centering on questions of religious freedom—by which the Church has attempted to avoid liability or limit exposure to damages.

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[2] With the filing of bankruptcy proceedings in the western United States by three dioceses of the Church (Tucson, Spokane, and Portland), other questions of religious liberty have arisen. These proceedings have resulted in the adjudication of a handful of important and previously undecided free exercise and religious liberty questions concerning ownership of church property and issues of charitable trust law. *See* Joseph A. Rohner IV, Comment, CATHOLIC DIOCESE SEXUAL ABUSE SUITS, BANKRUPTCY, AND PROPERTY OF THE BANKRUPTCY ESTATE: IS THE "POT OF GOLD" REALLY EMPTY?, 84 OR. L. REV. 1181 (2005).

[3] 328 Or. 367, 977 P.2d 1163 (1999).

[4] *Id.* at 375-76, 977 P.2d at 1167.

[5] A person, usually a nun, monk, or priest belonging to a religious order, such as the Franciscans, Benedectines, etc., is referred to as "a religious."

[6] Cases involving priests are by far the most prevalent, but other child abuse cases involving nuns, monks, and Catholic school teachers exist as well.

Throughout this several-part process, the religious liberty issues involved in the classic case scenario will be explained and explored with care and—it is hoped—sensitivity to the legitimate claims of religion.

Yet in almost every instance where there is a claim or defense of religious liberty, we argue that one of two realities emerge upon closer inspection. The first is that the claim in fact fails to raise a legitimate issue of religious liberty. The second reality is that when a claim of religious liberty is balanced against the interests of society, the "compelling interests"[7] of protecting children from sexual exploitation by trusted adults and rendering justice override the claim of religious liberty.

These twin realities reflect the notion, expressed for centuries in Anglo-American legal traditions, that there must be a balancing of civil and natural rights, even if this sometimes means that the unbridled expression of religious liberties must be curtailed by operation of the system of civil justice. Even devout defenders of religion have followed this notion,[8] and it remains true today that no civil right—even a natural right—is or can be

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[7] This phrase is from an older line of First Amendment religious liberty cases in which a governmental burden on religious practice is only justified if the societal or governmental interest at stake is a "compelling interest." *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 406-07 (1963).

[8] According to Edmund Burke:

> If civil society be made for the advantage of man, all the advantages for which it is made become his right. It is an institution of beneficence; and law itself is only beneficence acting by a rule. Men have a right to live by that rule; they have a right to do justice; as between their fellows, whether their fellows are in politic function or in ordinary occupation. They have a right to the fruits of their industry; and to the means of making their industry fruitful. They have a right to the acquisitions of their parents; to the nourishment and improvement of their offspring; to instruction in life, and to consolation in death. *Whatever each man can separately do, without trespassing upon others, he has a right to do for himself; and he has a right to a fair portion of all which society, with all its combinations of skill and force, can do in his favour*.

2 BURKE SELECT WORKS 69 (E.J. Payne ed., Oxford, Clarendon Press 1888) (emphasis added). Consider also this passage:

> In some people I see great liberty indeed; in many, if not in the most, an oppressive, degrading servitude. But what is liberty without wisdom, and without virtue? It is the greatest of all possible evils; for it is folly, vice, and madness, without tuition or restraint. Those who know what virtuous liberty is, cannot bear to see it disgraced by incapable heads, on account of their having high-sounding words in their mouths.

EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 412 (J.C.D. Clark ed., 2001).

unlimited in any society with diverse and competing claims of religious and secular authority. However, it is also argued here that there are ways in which any threats to religious liberty can and should be minimized through prudence and an appreciation for the legitimate claims and benefits of religious exercise.

A. The Classic Case:[9] *Part 1*

1. The Boy

Stephen, named for the New Testament martyr and saint, was the oldest of five sons born to a devout Irish Catholic family, the Connorses. He was born in 1955; at the time he filed suit in 2002 he was forty-seven. His family moved to Portland from the East Coast in 1961 when Stephen was six, and immediately they enrolled him at Our Lady of the Rose Catholic School. The family worshiped at the parish that housed the school.

Although both parents were Catholic and insisted on raising Stephen and his brothers in the Church, neither his mother nor father were very regular in attendance at Mass. Perhaps his mother was the more devout of the two, although Stephen knew his dad did believe in God. But Stephen's dad worked sixty-hour weeks at two jobs—his main job at the docks and a second job at night as a custodian at a local public school. By the time Sunday rolled around, his dad was tired and looking forward to a day off. Besides, he often was hungover on Sunday mornings: he was a hard-drinking man, almost certainly by today's standards what would be considered a functional alcoholic.

Often Stephen would wake up at night to hear his parents arguing and, sometimes, the nauseating sounds of his dad's massive hands on his mother's small body. His dad was often violent when drunk. Fortunately, Stephen had only been hit a few times through grade school.

The best times were when his dad would take Stephen and his brothers fishing. One time, when Stephen was ten, he even got to go fishing alone with his dad.

His mother would go to Mass during the weekday mornings so as to avoid the inevitable questions and glances from fellow parishioners if she were to go to Sunday Mass without her husband.

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[9] The facts presented in this hypothetical are a composite of actual facts taken from over 100 different clients of O'Donnell & Clark who have been involved in clergy sexual abuse. Of course the actual names, specific places, and dates in this hypothetical are fictional.

It was at one such weekday Mass in the early summer of 1966 that she first met Fr. Antonio Rossi, the new associate pastor. Right away she liked him; relatively young and energetic, "Father Tony" was charismatic, outgoing and funny, both in person and in his homilies. He was an outdoorsman, a hunter, and a fisherman. She immediately thought that Stephen might also like him, so she made sure she introduced herself and asked Fr. Tony, if he had a chance, to say hello to Stephen when he said Mass at the school or on a Sunday. He was so nice about it, replying that he would be glad to keep a lookout for Stephen. That gave her more hope than she dared admit.

2. The Priest (from All External Appearances)

Fr. Tony Rossi was a "Johannine Father"—a member of the Order of St. John the Evangelist—as were all the priests at Our Lady of the Rose. It was a parish that for years had been staffed by the Johannines as a service to the Archdiocese of Portland. Portland was one of two dozen or so dioceses around the country that the Johannines helped staff as a part of their outreach ministry to the larger Church. In that way, Fr. Tony actually had two bosses while in Portland. His permanent boss, of course, was the head of the Johannines, Fr. Francios Dubois, who was headquartered in Boston; but while he was on assignment in the Archdiocese of Portland, Fr. Tony was also working under the direct supervision and authority of the Archbishop.

Under Canon Law, the Archbishop issued "faculties" to Fr. Tony, a kind of deputization and authority to perform the sacraments within the jurisdiction of the Archdiocese. These faculties were a kind of representation or even certification to Catholics in Oregon that Fr. Tony was all the things a priest should be: holy, devout, dedicated wholly to the life of the Church, and, of course, celibate.

The full truth was a bit more difficult than that.

I

Why Liability Is Imposed Against a Church

What is the justification for imposing monetary liability against a nonprofit organization engaged in religious exercise, education, and many charitable activities that inarguably benefit society? More to the point, what are the legal theories by which we have decided that the damage done to children by pedophile priests

provides enough of a reason to impose liability against such an otherwise respected institution?

There are really two main legal theories: first, vicarious liability against the Church through the doctrine of respondeat superior for the tortious acts of its employee or agent, and second, basic negligence of the institution itself in selection, supervision, or retention of an employee-priest. We will examine each in turn.

But before we venture into this discussion, it is important to see how the relationship between Fr. Tony and Stephen developed from the priest's normal duties—duties sanctioned in this case by both the Johannine Fathers and by the Archdiocese. This development is significant because the doctrine of respondeat superior imposes liability upon a principal for the acts of its agent, and in the priest abuse context the tortious sexual abuse arises out of an authorized relationship sanctioned and sponsored by the Church.

A. The Classic Case: Part 2

1. The Relationship

It did not take long after Mrs. Connors had her talk with Fr. Tony for him to seek out Stephen. It happened one day in the autumn of Stephen's sixth grade year, just after he turned eleven. To everyone's surprise, Fr. Tony came into the classroom. Sister Rita Clare, the teacher, was both unnerved and flattered that he would visit. Everyone liked Fr. Tony, including the nuns who staffed the school from the Order of the Holy Child Jesus.

So Sister Rita Clare was pleased when he came in that day and sat in the front while she taught math for about ten minutes. After that, he politely interrupted and asked her if he could "borrow" one of the boys for a bit. Stephen Connors nearly wet his pants when Fr. Tony pointed him out and said kindly, "Stephen, could you come with me, please?"

Once in Fr. Tony's office, the priest explained to Stephen that he was looking to strengthen the ranks of altar boys and asked him if he would like to serve God and his church in this way. When Stephen said, "I guess so," Fr. Tony was obviously pleased and said that Stephen could start training with the other boys this coming Saturday. But Fr. Tony also said that he wanted Stephen to be a member of St. Peter's Guild—a special honor for only a very few altar boys, selected secretly by one priest in each parish. Would

Stephen like to be a member of the Guild? Stephen was both proud and surprised to be selected. He said yes.

Fr. Tony also said he understood Stephen liked fishing, so how about if they went fishing sometime?

And so began their friendship. All fall, each Wednesday, Fr. Tony would come pull Stephen out of class and take him to his office. He would spend a bit of time talking about Stephen's performance last Sunday at Mass and about St. Peter's Guild. Then they would go fishing. Sometimes afterward, they would go have hamburgers and talk about fishing or sports. Every so often on Friday nights, Fr. Tony would take Stephen to a movie or to get ice cream.

Once or twice, Stephen opened up to Fr. Tony about his dad's drinking and the fighting between his parents. Fr. Tony responded with great warmth and support, saying he would certainly remember them in his prayers and during Mass. Stephen felt really lucky that he got to be such great friends with Fr. Tony. He knew, of course, that Fr. Tony spent time with other boys. Fr. Tony helped coach the Catholic Youth Organization football team and even spent some time helping out with the Boy Scout troop sponsored by Our Lady of the Rose.

Everyone liked Fr. Tony, including Stephen's brother Thomas, who was younger by two years. Stephen noticed that Fr. Tony and Thomas would sometimes hang out on Tuesday nights before Scouts. That was good, Stephen thought. Fr. Tony was a great guy. Even his next younger brother Matthew had said something about Fr. Tony taking him to his office one day to show him his new fly rod. But Stephen knew that only he was a member of St. Peter's Guild, and only he was Fr. Tony's best fishing buddy. Fr. Tony had said so.

Then one day about two months after Stephen's induction into St. Peter's Guild, after their usual office visit but before they went fishing, Fr. Tony asked Stephen if he wanted to make confession. Now, Stephen had only been to confession on a handful of occasions, and he was always a little uncomfortable with it. He never knew what to say. So he was quite surprised when, after he confessed to Fr. Tony about sometimes being mad at his brothers, Fr. Tony, through the wall of the confessional, asked him if he had ever had "impure thoughts." Stephen didn't really know what the priest meant, so Fr. Tony explained. Thoughts about girls, he said, about their bodies, about them being naked, anything like that.

Stephen gulped hard and said, "Yeah, sometimes." Fr. Tony asked other questions, even more embarrassing ones, about Stephen touching himself, and after a long, long pause, Stephen again said, "Yeah, sometimes." Then, somewhat abruptly, Fr. Tony ended the confession, and led Stephen into an upstairs room in the rectory.

There, he explained that the Pope had appointed one priest in every parish—the same one who was to choose the altar boys for St. Peter's Guild—to make sure that the boys of the parish were pure in body, soul, and spirit. In order to be pure, Fr. Tony explained gently, Stephen must not only tell Tony about his impure thoughts and actions but must show them to him as well. Fr. Tony stressed to Stephen that if each time he made a confession and acted out his impure thoughts, even if Tony had to help him act them out, then he could perhaps be pure and holy as members of St. Peter's Guild had to be and receive absolution for his sins. And, of course, Stephen would have to keep the secrecy of the confessional, Fr. Tony reminded him. If Stephen failed in either charge, then, make no mistake, Stephen would be guilty of mortal sin and would go to hell.

And so it began.

B. The Respondeat Superior Balancing Doctrine

Respondeat superior is an ancient idea in law, stretching back at least to Roman times.[10] It holds the "master" responsible for the wrongdoing of the "servant" done in the ordinary course of the servant's duties. It is *automatic* responsibility—in other words, without regard to whether the master independently and personally did wrong. If the master sends the servant and benefits from the servant's actions, then the master is responsible as a matter of social policy and fairness when the servant causes injury to a third party.

Ultimately, respondeat superior is, at its most bare reality, a means of allocating monetary damages from the victim of tor-

[10] O.W. Holmes, Jr., *Agency*, 4 HARV. L. REV. 345, 348-50 (1891) (tracing a master's liability for a servant's acts to Roman law). For a further discussion of the history of respondeat superior, see THOMAS BATY, VICARIOUS LIABILITY 146-54 (1916); Oliver Wendell Holmes, Jr., *Agency II*, 5 HARV. L. REV. 1 (1891); and John H. Wigmore, *Responsibility for Tortious Acts: Its History II*, 7 HARV. L. REV. 383 (1894). Holmes and Wigmore began at opposite premises but arrived at the consensus that English law arose out of earlier, more barbaric systems in place prior to the Norman Conquest. *See* Nelson P. Miller, *An Ancient Law of Care*, 26 WHITTIER L. REV. 3, 3-4 (2004).

tious conduct to the entity in the best position to compensate that victim.[11] This is indeed the case in Oregon, where "the doctrine of respondeat superior is applied as a policy of risk allocation, whereby an employer is held vicariously liable for certain injuries caused by an employee. . . . The underlying rationale is that 'the [employer] rather than the innocent injured plaintiff is better able to absorb and distribute the risk.'"[12]

"Which party is better suited to absorb risk" is the driving consideration in the typical respondeat superior situation, but it is not the entire rationale behind imposing this type of strict liability in the child abuse context.

When dealing with employees who abuse a position of trust and authority over children, respondeat superior liability is justified more as a means of balancing the damage inflicted by agents in the course and scope of their agency against the benefit that the principal gets from the agent's work. This forms the crux of the rationale for imposing respondeat superior liability on churches for the actions of religious employees. The rationale in the priest cases is that the priest "used the job to groom the child."[13] Reference to the story of Stephen and Fr. Tony makes clear that without the church-sponsored relationship of trust—trust given by both the parents and the child—the perpetrator would not have had occasion to abuse the boy. The widely popular and trusted Fr. Tony was *supposed* to spend time with boys, win their trust, be a male role model, and be a sign of hope for troubled mothers worried about their troubled sons. Likewise, Stephen was right—in the eyes of the Church and by common sense—to trust the priest with his problems, to want to make his confession, to be drawn to the charismatic young priest, to feel special in his eyes, and to obey the directions of his priest and pastor.

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[11] Thomas Baty characterized this balancing test less charitably: "In hard fact, the real reason for employers' liability is . . . the damages are taken from a deep pocket." BATY, *supra* note 10, at 154. *See also* Jill Fedje, *Liability for Sexual Abuse: The Anomalous Immunity of Churches*, 9 LAW & INEQ. 133, 142 n.70 (1990) ("[I]t is socially more expedient to spread or distribute among a large group of the community the losses which experience has taught are inevitable in the carrying on of industry, than to cast the loss upon a few." (quoting Young B. Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444, 457-58 (1923))) (alteration to the original).

[12] Hanson v. Versarail Sys., Inc., 175 Or. App. 92, 100-01, 28 P.3d 626, 630 (2001) (quoting Farris v. U.S. Fidelity & Guaranty Co., 273 Or. 628, 637, 542 P.2d 1031, 1035 (1975)).

[13] *See* discussion *infra* Part III.A.

Under those facts, the argument goes, since the Church gets all the benefits of the good priests, why as a matter of social policy should the Church not carry the risk of the few bad priests as their employer and sponsor? After all, the Church benefits when Catholic boys become Catholic men who are loyal to the Church and consequently sustain the Church through the next generation. Is it really fair that the burden should rest on the innocent victim of the abuse—that as a grown man Stephen should have to deal on his own with the costs of his broken life or his long journey toward wholeness? Or should the Church that introduced him to Fr. Tony not bear that cost? Assuming that the friendship arose out of a trust relationship sponsored by the Church, at the least a jury should be able to make that decision. These, in any event, were the arguments made to the Oregon Supreme Court in *Fearing v. Bucher* and the arguments that the court apparently found persuasive.

The more common and well-publicized theory for holding Church entities responsible for child abuse is negligence, the well-worn tort that simply holds one party responsible when his or her conduct proximately causes injury to another. In order to understand why the Archdiocese of Portland and the Johannine Fathers might be liable in negligence in our story, it is necessary to know what the Church knew about Fr. Tony, when they knew it, and what they did and did not do about it.

C. The Classic Case: Part 3

1. The Priest from the Inside and What Really Happened in Portland

The full truth about Fr. Tony was a bit more difficult than the certifications that the Johannines and the Archdiocese made about him when they placed him at Our Lady of the Rose. The fact is, Fr. Tony Rossi had been ordained a priest for nearly a decade and already this was his fourth assignment in just the last six years. Tony had had some problems in earlier assignments, and this was his third "second chance." But Fr. Dubois, the Johannine Superior, liked Fr. Tony and wanted him to do well. Besides, the Johannines had a lot of time, energy, and money invested in Tony. And, of course, since Vatican II and the advent of the American 1960s, the Johannines had had a net decline in the number of new vocations—many of the younger and middle-aged priests were leaving, and new postulants were in decline. Also, Tony had such

obvious gifts. He was richly educated and articulate, personable, and a good fundraiser. People, especially young people, just flocked to him. Fr. Dubois could actually imagine him as having quite a future in the Johannine hierarchy. He just had to stick to his vows and keep the drinking under control.

Fr. Dubois was quite sure that it had been the alcohol that had led to Fr. Tony's indiscretions in his prior assignments. And now that Fr. Tony had been through an alcohol treatment program at a Catholic facility back East, joined Alcoholics Anonymous, and had made a sacramental confession—the penance included a sacred vow that he would watch his relationships with boys more closely—Fr. Dubois was hopeful.

Still, just to make things simpler and to protect both Fr. Tony and the Order, Fr. Dubois had not sent the Portland Archdiocese Fr. Tony's personnel file. And Portland had not asked for it. If they had, of course, they would have seen the 1961 letter of complaint that had come from the family at the parish in Kansas City and the 1964 correspondence between the Bishop of Santa Fe and Fr. Dubois.

Both letters were naturally in the secret archives—a kind of deep storage kept under Canon Law.[14] *Both letters concerned Fr. Tony's interactions with boys and had the potential to cause scandal for the Church and for Fr. Tony. One letter was a bit vague, but the other was quite specific and more troubling. Still, Fr. Dubois had made sure that the only references in the main file were to Tony's alcohol problem. But even that—along with the several transfers from one parish to another—would be a flag to any bishop with his eyes open. Thankfully, thought Fr. Dubois, neither the Archbishop of Portland nor the Vicar for the Clergy—a kind of priest personnel director—had asked about the reasons for Tony's reassignment to Portland, nor had they asked for his file.*

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[14] Canon 489 on "The Secret Archive" states in section 1 that "[i]n the diocesan curia there is also to be a secret archive, or at least in the common archive there is to be a safe or cabinet, completely closed and locked, which cannot be removed; in it documents to be kept secret are to be protected most securely." 1983 CODE c.489, § 1.

Commentary to this section notes that while Canon 489 does not list the documents that are to be held in the secret archive, "[a]n illustrative list could be constructed by reference to other parts of the code" including registries of dispensations from occult marriage impediments (c.1082), registries of secret marriages (c.1133), warnings and rebukes as penal remedies (c.1339, § 3), and other documents relating to the penal process. JOHN P. BEAL ET AL., NEW COMMENTARY ON THE CODE OF CANON LAW 642-43 (2000).

Portland, like everywhere else, desperately needed priests, so they were glad for the help from the Johannines.

To go back further, however, Fr. Tony's trouble had actually started in seminary. He had taken first vows as a postulant in the Sangre de Christo Order in the Southwest, but after two years of formation, they had decided that he would not be a good fit for priestly vocation. They were never quite specific about why. The only files that the Johannines had ever seen merely mentioned the problem of "temperament." But when Tony had asked them whether he could apply to become a priest with the Johannines, who had spread the word starting in the late 1950s that they were looking to expand their preaching ministries, the Sangre de Christos gladly gave their okay.

The Johannines, including Fr. Dubois, were impressed with Tony's persistent desire to become a priest. And his explanation about his false start had made sense to Fr. Dubois—that the real problem with the Sangre de Christos was that they were old school and not open to a more modern presentation of the Gospel. The whole problem had really just been a personality clash between him and the Sangre de Christo Superior. Unlike the difficult letters from his former assignments, none of these early difficulties were even in the secret archives of Fr. Tony's files with the Johannines. Fr. Dubois had sent these materials back to the Sangre de Christos. There was no reason, now that Tony was to be Johannine, that a past problem, whatever it was, should mar Fr. Tony's name with them.

Nevertheless, Fr. Dubois observed how difficult it would have been if Portland had asked for Tony's entire file, including his seminary files. If they had, of course, Fr. Dubois would have had to tell them everything. Under Canon Law as well as a sort of unwritten code of conduct between members of the Church hierarchy, it is one thing to keep troubling material in the deep archives or at an old seminary, but it is another thing to give an outright false answer to a direct question from a bishop. Fortunately, the Archdiocese of Portland had never asked.

Fr. Dubois hoped this was a sign that Fr. Tony was finally under a more positive divine grace. Fr. Dubois believed deeply in grace, redemption, and the power of the Holy Spirit to change a man. Even Fr. Dubois himself had been deeply changed after much prayer and grace. He recalled it had been over ten years since he had had any women problems. Though his and Fr. Tony's

problems were quite different in nature, Fr. Dubois believed that if God could release him from his besetting sin, then God could release Fr. Tony from his. Fr. Dubois was sure of it.

So Dubois made the assignment, Fr. Tony went to Portland, Stephen and Fr. Tony became friends, and the confession rituals began.

Then, about three years after Fr. Tony was transferred to the Archdiocese of Portland, it all blew up again. From Stephen's perspective, it all ended abruptly. One day, Fr. Tony was gone. That's all Stephen knew. The nuns said he had been transferred. That's all they said. Rumors were everywhere, but Stephen didn't really listen to them. They said he was a drunk and that some sailor here for the Rose Festival had gotten Fr. Tony in trouble with the Archbishop.

Stephen kept wondering if he would come back, or at least write. After all, Stephen remembered, Fr. Tony had gone away once before for about thirty days. Stephen's mom had told him about that. She had said it was because Fr. Tony was exhausted and the Archbishop had insisted he needed a rest. But even then, they had announced it from the pulpit. This time, he was just gone and no one ever said why.

What Stephen did not know about, and indeed what his mother did not know about either, was the truth about Fr. Tony's past, the material in the Johannine files, and "Fr. Tony's problem." The Archbishop first learned about Tony's problem about nine months into his abuse of Stephen. The Archbishop had gotten a phone call. It seems the police had picked up Fr. Tony, drunk and nearly passed out, on the streets of downtown Portland one night during the Rose Festival. He and a young sailor on leave had been caught in a compromising position with a teenage boy in a public park.

Upon learning this, the Archbishop called the Johannine Superior Fr. Dubois, asking if anything like this had ever happened before. That is when the Archbishop first learned that Fr. Tony had a past problem with boys. The Archbishop knew then that he had a decision to make. And so, upon recommendation from his Vicar General and Fr. Dubois, the Archbishop decided to send Tony for alcohol treatment. He had seen other priests with this problem, and almost always it seemed to be alcohol that was the main problem. And, of course, an insufficient prayer life. So they sent him to a Catholic facility in New Mexico to deal with his alco-

hol problem and to get clear that he really must abide by his vow of celibacy, especially when it came to boys.

D. The Rationale for Imposing Negligence Liability

In contrast to respondeat superior, liability for negligence is based upon the allocation of liability to a party who fails to exhibit reasonable prudence in conducting its affairs.[15] All persons have a "general common-law responsibility . . . to avoid conduct that creates a specific risk of injury to others."[16] There would appear little justification to exempt a religious organization from liability for its own carelessness—especially an organization that actively recruits children and families. Indeed, with negligence, the question of fairness in holding a party liable is not once-removed from the direct actions of that party, as is the case with respondeat superior. Instead, negligence focuses on a party's own fault in behaving in a careless or reckless manner when such behavior could foreseeably impact another's interests.[17]

In the priest abuse context, particularly where Oregon's extended child abuse statute of limitations comes into play, negligence imposes liability for actions that constitute "knowingly allowing, permitting or encouraging child abuse."[18] However, according to the Oregon Court of Appeals, this standard requires

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[15] According to the Oregon Supreme Court:

> Negligence . . . is defined as the doing of that thing which a reasonably prudent person would not have done, or the failure to do that thing which a reasonably prudent person would have done, in like or similar circumstances; it is the failure to exercise that degree of care and prudence that a reasonably prudent person would have exercised in like or similar circumstances.

Biddle v. Mazzocco, 204 Or. 547, 554, 284 P.2d 364, 368 (1955).

[16] Garrison v. Deschutes County, 334 Or. 264, 271-72, 48 P.3d 807, 811-12 (2002).

[17] Conduct that causes a foreseeable risk of harm is the first element of negligence in Oregon. Fazzolari v. Portland Sch. Dist. No. 1J, 303 Or. 1, 17, 734 P.2d 1326, 1336 (1987).

[18] OR. REV. STAT. § 12.117(1) (2005). ORS 12.117 only applies to negligence actions where the institutional defendant had some reason to know of the perpetrator's danger prior to the abuse. *See* Lourim v. Swensen, 147 Or. App. 425, 442 n.8, 444, 936 P.2d 1011, 1021 n.8, 1022 (1997), *rev'd on other grounds*, 328 Or. 380, 977 P.2d 1157 (1999) (noting that in the legislative history of ORS 12.117, the sponsors of the bill envisioned the law would apply to conduct that allowed, permitted, or encouraged child abuse, in light of reports of abuse by clergy). ORS 12.117 is the only way in which most child abuse cases are justiciable, as delayed discovery in child abuse cases makes suits brought contemporaneous to the abuse exceedingly unlikely. *See* discussion *infra* Part II.A. ORS 12.117's "knowingly" language makes negligence a rare vehicle for victims to bring suit. *Id.*

"actual knowledge" instead of mere "constructive knowledge."[19] In the case of Fr. Tony, it no doubt might be considered ordinary negligence for the Archdiocese of Portland to have failed to ask for the files on Fr. Tony from the Johannine Fathers. That is, they should have known about his propensities, but without more, this probably does not constitute "knowingly allowing child abuse."

On the other hand, a jury could easily find that the Archbishop "knowingly" allowed, permitted, or encouraged child abuse once he knew of Tony's past problems and placed Fr. Tony back in ministry. After all, at this point the Archbishop had been warned about Fr. Tony's propensities with children in other contexts; he had also failed to notify parishioners at Our Lady of the Rose that Fr. Tony had a problem with boys, thus "knowingly allowing, permitting or encouraging" child abuse. At some point "foreseeability" becomes "predictability."

Another interesting question is what to do with Fr. Dubois's sincere religious belief that God could and would change Fr. Tony.[20] This belief is consistent, at least doctrinally, with Church teaching on repentance, forgiveness, and transformation by divine grace. But can we fairly ask a secular jury to judge this religious thinking?

As illustrated by Fr. Dubois's hopeful faith, the theory of negligence has been held to present First Amendment problems in some cases.[21] But while negligence does impose secular standards of care on the employment decisions of religious institutions, the better analysis, including Oregon's, seems to be that all persons, including churches, are held to the law's reasonable person standard of care.[22]

Moreover, the negligence case of Stephen Connors against the Archdiocese and the Johannine Fathers is fundamentally unlike other cases that might trigger religious liberty concerns. The Archdiocese and Our Lady of the Rose held the parish out to the

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[19] *Lourim*, 147 Or. App. at 444, 936 P.2d at 1022.

[20] *See* discussion *infra* Part III.B.2.

[21] Scott C. Idleman, *Tort Liablity, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219, 234-35 nn.42-45 (2000) (collecting cases).

[22] Victor E. Schwartz & Leah Lorber, *Defining the Duty of Religious Institutions to Protect Others: Surgical Instruments, Not Machetes, Are Required*, 74 U. CIN. L. REV. 11, 44 n.156 (2005) (collecting cases holding that the First Amendment prevents adjudication regarding whether church leadership negligently hired, supervised, trained, or retained clergy). For questions that arise from imposing a secular negligence standard on religious institutions, see discussion *infra* Part III.B.2.

despairing Mrs. Connors as a caring, loving, and safe place where she could send her boys. To her, the parish was a place where the family was invited generally to enter and partake in the life of the Faith. Such a case stands in contrast to the more classic free exercise or establishment concern where the propriety of church rules is debated among contending intrafaith factions.[23] Stephen's case is simply not an instance of the secular order arbitrarily invading the inner workings of a religious organization; it is a case of the secular order holding the organization to its own very public representations that have injured third parties, in this case an innocent boy. It is hard to see why a negligence theory should not be applied to the facts of these abuse cases.

But justified as it is in the first instance to impose liability on the Church for abusive priests without considering claims of religious liberty, there is yet another complicating factor in these abuse cases: they are often brought thirty, forty, or even fifty years after the abuse. This raises, of course, many practical problems for litigants. But apart from that, for those unfamiliar with the world of child sexual abuse, it raises outright questions of legitimacy.

Why did they wait so long? Is it just that they are jumping on the bandwagon, or is it, as the Archbishop of Portland put it the day he filed for bankruptcy protection, because these victims are after the Church's "pot of gold"?[24] Is the very rationale for an extended statute of limitations simply a kind of anti-Catholic bigotry—as one bishop of the Church has argued?[25] So these issues demonstrate that in any discussion of issues of justice in the priest abuse cases, it is necessary to understand how child abuse impacts its victims' ability to understand what has happened to them.

The fact is most victims are simply unable to discuss their abuse or recognize its impact until well into adulthood.[26] Thus, in order for child abuse victims to have a chance of recovery, an equitable and realistic statute of limitations must take into account the very nature of child abuse actions. While Oregon's

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[23] *E.g.*, Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 721 (1976) (refusing to determine which bishop was properly seated under church rules).

[24] *See* Alan Cooperman, *Archdiocese of Portland, Ore., Declares Bankruptcy*, WASH. POST, July 7, 2004, at A01, *available at* http://www.washingtonpost.com/wp-dyn/articles/A31266-2004Jul6.html.

[25] Charles J. Chaput, *Suing the Church*, FIRST THINGS, May 2006, at 13, 14.

[26] The reasons for this delay are discussed *infra* Part II.C.

child abuse statute of limitations attempts to do just that, it is not without complexity or controversy.

II

An Extended Statute of Limitations: Oregon Revised Statute 12.117 and the Impact of Child Abuse

Because the concerns surrounding child abuse are in fact different from most types of tort actions, Oregon, as many states, has seen fit to enact an extended statute of limitations that allows for delayed discovery of latent injury in child abuse cases. The following discussion examines both the structure and the rationale for the extended child abuse statute of limitations, including the nearly incomprehensible damage that child abuse inflicts on the psyche of the victim.

A. The Structure and Operation of Oregon Revised Statute 12.117

The Oregon Legislature first enacted the special child abuse statute of limitations found in ORS 12.117 in 1989 and subsequently amended it to allow for retroactive application.[27] ORS 12.117 provides that child abuse victims, including victims of both physical and sexual abuse, have until their twenty-fourth birthday to file suit for action based on child abuse or "conduct knowingly allowing, permitting or encouraging child abuse."[28]

Yet because child abuse victims often do not realize that the abuse has caused permanent emotional injury until later in life, ORS 12.117 creates an important allowance. The statute permits an adult survivor of child abuse to bring suit "not more than

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[27] The amendment is as follows:

> The amendments to ORS 12.117 by section 1 of this Act apply to all causes of action whether arising before, on or after the effective date of this Act [July 8, 1993], and shall act to revive any cause of action barred by the operation of ORS 12.117 (1991 Edition). Notwithstanding any other provision of law, any cause of action that was dismissed or adjudicated before the effective date of this Act based upon that provision of ORS 12.117 (1991 Edition) requiring that an action be commenced on or before the plaintiff attains 40 years of age may be brought within one year after the effective date of this Act as though the original proceeding had never been commenced.

Act of July 8, 1993, ch. 296, § 2, 1993 Or. Laws 752 (codified at Or. Rev. Stat. § 12.117 (2005)).

[28] Or. Rev. Stat. § 12.117(1) (2005).

three years from the date the injured person discovers or in the exercise of reasonable care should have discovered the injury or the causal connection between the child abuse and the injury."[29] The statute even supersedes Oregon's statute of ultimate repose, which is normally ten years.[30] In this way, ORS 12.117 allows an adult of any age to bring suit against an abuser and the responsible institution[31] within three years of making a causal connection between child abuse and subsequent mental or emotional difficulties experienced as a result of the abuse.[32]

In the context of ORS 12.117, it is important to note that a victim's awareness that he or she has been sexually abused is not itself the "injury" that triggers the running of the statute of limitations. While this obviates the need for controversial repressed memory evidence, the abuse–injury distinction has created considerable confusion in applying ORS 12.117. As the Oregon Court of Appeals noted:

> No plausible definition of "injury" can make perfect sense in this statute. . . . A definition equating the "injury" with the abusive conduct itself makes the statute unintelligible: the statute treats the abuse and the injury as logically and temporally distinct concepts, in that the "abuse" is said to *cause* the "injury," and a thing cannot cause itself.[33]

However, when viewed in light of the psychological realities of child abuse, it makes sense to draw a fine distinction between the actual abuse and contemporaneous pain felt, and the recognition later in life that child abuse causes lingering and severe damage distinct from that initial abuse. Again, our story shows why.

B. The Classic Case: Part 4

1. The Betrayal and What Happened During "Confession"

Fr. Tony and Stephen met for confession every week. Later it became two and then three times a week. Eventually, Fr. Tony

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[29] *Id.*

[30] *Id.* § 12.140.

[31] Ironically and somewhat inexplicably, ORS 12.117 does not apply to governmental child abusers and to governmental employers under the Oregon Tort Claims Act. *See id.* § 30.275(9).

[32] Simple negligence of an institutional defendant will not trigger ORS 12.117 absent some knowledge held by the employer that the employee posed a danger to children. Lourim v. Swensen, 147 Or. App. 425, 444, 936 P.2d 1011, 1022 (1997), *rev'd on other grounds*, 328 Or. 380, 977 P.2d 1157 (1999); *see also* discussion *infra* Part III.B.

[33] Jasmin v. Ross, 177 Or. App. 210, 215 n.3, 33 P.3d 725, 727 n.3 (2001).

explained to Stephen about the intense physical response that Stephen would have upon showing Fr. Tony his impure thoughts—a response that Fr. Tony called "the eruption of sin." Fr. Tony explained how it was good that it happened, because it was "liquid evil" that was being pulled out of him. Now thirteen years old, Stephen knew that he must, indeed, have a lot of sin and evil in him, not only because of the eruptions of sin, but because (he dared not tell even Fr. Tony this) when the liquid evil came out of him it actually felt good. He wished he could confess that it felt good, but he knew that this was something that was way, way too bad even to confess. He wondered if he would go to hell for being so evil that he could not even confess truthfully. He thought he probably would. He spent a lot of time wondering what hell would be like.

Sometimes confession was not even done in the confessional, or even at the church. On several occasions Stephen made his confession and acted out his sins and the eruptions of evil on the banks of rivers where they fished, in the car on the way back, or once after dark in the car in front of Stephen's house. They even took several trips together, usually fishing trips, that spanned all over the Northwest. They went to Central Oregon, Eastern Washington, and even into British Columbia. Always there was confession.

Often Tony would drink fairly heavily. On several occasions later on, Tony actually passed out during or right after confession in hotel rooms or churches where they stayed. Once at one of the churches in Washington, another priest joined them for confession; Fr. Tony explained that he, too, was a Priest of St. Peter's Guild. He, too, drank heavily and participated in the ritual.

Then, one day, right after Stephen turned thirteen, Fr. Tony insisted that it was time that Stephen learned to drink like a man. After two beers, Stephen was dizzy and confused; after four, he was nearly blacked out. The next morning, had it not been for the excruciating pain he experienced between his legs upon awakening, he might not even have remembered what had happened. From then on, often there was beer before and right after confession. Almost always beer, and almost always pain.

Stephen, of course, told no one. He knew what would happen if he broke the seal of the confessional. Any good Catholic knew that. But even without that, Stephen did not want anyone to know what was happening. As he got older—thirteen, then fourteen—he

started wondering if it was right for Fr. Tony to give him beer. He wondered about other things, too—like why Fr. Tony had eruptions of evil. But he couldn't tell anyone about his questions. He didn't know what he would have said anyway, how he would have explained it, and he knew no one would believe him. Besides, Fr. Tony was really important to him. Stephen liked his friendship and couldn't imagine betraying his instructions.

Later, after Fr. Tony went away, Stephen was lost. He felt totally alone. He got really depressed. And angry. Within a few months he was drinking frequently on his own, even if he had to steal the alcohol from his father. By the time he was fifteen, he was smoking marijuana—it helped him feel less angry. Later he did other drugs. When he was high was the only time he wasn't in turmoil. He dropped out of Cleveland High School after his sophomore year. He had been kicked out of Central Catholic his freshman year for drinking and for bad grades. Unlike two of his brothers, he never went to college.

Stephen just kept making bad choices, it seemed. He hated authority figures and could not trust anyone. For thirty years, he was angry almost all the time. He often got in fights. He couldn't get close to even his children. He was depressed—clinically depressed he found out later—for three decades. He had serious sexual problems. Once when he was forty, he tried to kill himself with an overdose, but he only ended up in the psych ward of a local hospital on a thirty-day commitment. That was the only time since Fr. Tony had left that he ever prayed. And it didn't work then either. He had no faith in any kind of God. And he absolutely hated the Catholic Church.

He never told anyone about what happened with Fr. Tony—not his parents, not his brothers, not any of his three wives, not anyone in the three drug rehab centers he was in, not the marriage counselor he saw with his third wife to deal with his anger and sexual hang-ups, not even his friends in AA in 2000 when he finally got clean and sober. He told no one—until that day in 2002 when he saw the familiar face in a photograph in the newspaper. It was there along with a story that ten men had filed suit against the Archdiocese of Portland and the Johannine Fathers for sexual abuse by one Fr. Antonio Rossi. He would eventually learn that two of the men were his brothers. He had never known. He thought he was the only one.

C. The Unique Nature of Child Abuse

Damage of a physical or sexual nature, when done to a child, forms an emotional scar on the psyche that does not typically reveal itself until later in life.[34] In this way, child sexual abuse is unlike virtually any other tort claim. Child abuse looks very different depending upon whether the perspective is from a clinician, an abuser, or a victim. But all three views converge on this truth: pedophiles[35] commit most of their crimes against children who trust them.[36] This means, of course, that pedophiles must get themselves into a position where they can be trusted. It also

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[34] *See generally* David Viens, *Countdown to Injustice: The Irrational Application of Criminal Statutes of Limitations to Sexual Offenses Against Children,* 38 SUFFOLK U. L. REV. 169, 176 (2004) (describing effects of childhood sexual abuse).

[35] While the technical term for attraction to postpubescent teenagers is ephebophilia, for simplicity, the term pedophilia is used in this Article. The *Diagnostic and Statistical Manual of Mental Disorders* defines pedophilia as follows:

> The paraphilic focus of Pedophilia involves sexual activity with a prepubescent child (generally age 13 years or younger). . . . Those attracted to females usually prefer 8- to 10-year-olds, whereas those attracted to males usually prefer slightly older children. . . . Individuals with Pedophilia who act on their urges with children may limit their activity to undressing the child and looking, exposing themselves, masturbating in the presence of the child, or gentle touching and fondling of the child. Others, however, perform fellatio or cunnilingus on the child or penetrate the child's vagina, mouth, or anus with their fingers, foreign objects, or penis and use varying degrees of force to do so. *These activities are commonly explained with excuses or rationalizations that they have "educational value" for the child, that the child derives "sexual pleasure" from them, or that the child was "sexually provocative"*—themes that are also common in pedophilic pornography. . . .
>
> Individuals may limit their activities to their own children, stepchildren, or relatives or may victimize children outside their families. Some individuals with Pedophilia threaten the child to prevent disclosure. Others, particularly those who frequently victimize children, develop complicated techniques for obtaining access to children . . . . Except in cases in which the disorder is associated with Sexual Sadism, the person may be attentive to the child's needs in order to gain the child's affection, interest, and loyalty and to prevent the child from reporting the sexual activity. . . . The course is usually chronic, especially in those attracted to males. The recidivism rate for individuals with Pedophilia involving a preference for males is roughly twice that for those who prefer females.

DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 571 (4th ed. text rev. 2000) (emphasis added) [hereinafter DSM-IV-TR].

[36] *See* Reuben A. Lang & Roy R. Frenzel, *How Sex Offenders Lure Children*, 1 ANNALS SEX RES. 303, 305 (1988) (suggesting that as many as seventy-five to eighty percent of all child sex abuse occurs in the context of trusted adult fathers, neighbors, or authority figures); *see also* Psychology Today's Diagnosis Dictionary: Pedophilia, http://www.psychologytoday.com/conditions/pedophilia.html (last visited Oct. 5, 2006) ("Offenders are usually family friends or relatives.").

means they are very good at winning the trust of children and their families.[37] This is why the ranks of schools, athletic leagues, churches, and Scouts are so frequently ideal sites for pedophiles.[38]

It also means these child abuse victims will remain scarred for life.[39] They will come to despise their own existence and will become covered with "shame"—a catch-all term modern psychology uses to describe absolute self-hatred and loathing—as a result of childhood sexual trauma.[40] They stand a substantially greater chance of becoming addicts, commonly to drugs, alcohol, gambling, or sex.[41] Most ironically, they stand a very high chance

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[37] KENNETH V. LANNING, NAT'L CTR. FOR MISSING & EXPLOITED CHILD., CHILD MOLESTERS: A BEHAVIORAL ANALYSIS 55-56 (4th ed. 2001), *available at* http://www.missingkids.com/en_US/publications/NC70.pdf. *See also* CARLA VAN DAM, THE SOCIALLY SKILLED CHILD MOLESTER: DIFFERENTIATING THE GUILTY FROM THE FALSELY ACCUSED 2-4 (2006).

[38] An estimated two percent of U.S. Catholic priests are pedophiles, with an additional four percent who are sexually drawn to older youths. A.W. RICHARD SIPE, A SECRET WORLD: SEXUALITY AND THE SEARCH FOR CELIBACY 162 (1990). Between 1952 and 2004, "children made more than 11,000 allegations of sexual abuse by priests. The 4,450 accused priests represent about 4 percent of the 110,000 priests who served during the 52 years covered by the study." *Draft Survey: 4,450 Priests Accused of Sex Abuse*, CNN.COM, Feb. 17, 2004, http://www.cnn.com/2004/US/02/16/church.abuse/index.html.

Patrick Boyle estimated the Boy Scouts had at any given time during the last quarter of the past century as many as two thousand child-molesting Scout leaders. PATRICK BOYLE, SCOUT'S HONOR: SEXUAL ABUSE IN AMERICA'S MOST TRUSTED INSTITUTION 271 (1994). These included former Scout Master Thomas Hacker of Illinois, who had well over 100 victims, and former Scout leader Franklin Mathias of Oregon, who estimated that over thirty years he had 1100 sex acts with boys and counted his victims at 242. *Id.* at 32. He had been named "Scouter of the Year" by the Eastern Oregon District of the Boy Scouts in 1986. *Id.*

[39] Exploited children are often unable to develop healthy relationships and show severe dysfunctions later in life. Jeffrey B. Bryer et al., *Childhood Sexual and Physical Abuse as Factors in Adult Psychiatric Illness*, 144 AM. J. PSYCHIATRY 1426, 1429 (1987); Ulrich C. Schoettle, *Child Exploitation: A Study of Child Pornography*, 19 J. AM. ACAD. CHILD PSYCHIATRY 289, 296-98 (1980); Viens, *supra* note 34, at 176 n.49 (2004) ("Additional '[l]ong-term effects of child sexual abuse can include . . . self-destructiveness, anxiety, sleeping problems, eating disorders, disassociation, poor self-esteem, trouble with interpersonal relationships, difficulty trusting others, vulnerability to revictimization later in life . . . and other problems with functioning socially.'" (quoting Rebecca J. Whitcombe, Essay, *Child Sexual Abuse: Adult Survivors, Repressed Memories, and Stories Finally Told*, 11 UCLA WOMEN'S L.J. 255, 259-60 (2001))).

[40] JOHN BRADSHAW, HEALING THE SHAME THAT BINDS YOU (1988); *see also* Candice Feiring & Lynn S. Taska, *The Persistence of Shame Following Sexual Abuse: A Longitudinal Look at Risk and Recovery*, 10 CHILD MALTREATMENT: J. AM. PROF'L SOC'Y ON ABUSE CHILD. 337, 337-47 (2005).

[41] Ann W. Burgess et al., *Abused to Abuser: Antecedents of Socially Deviant Be-*

of becoming sexual abusers of children themselves, perpetuating the cycle all over again.[42]

In order to merely survive the sexual abuse of a trusted figure with personality intact, a child will don the "psychological armor" of emotional avoidance, denial, and repression to cope. However, these coping mechanisms often cause the child not to realize or experience the symptoms of the sexual abuse for many years, until the symptoms are forced into plain view by therapy or a "developmental trigger."[43]

Until such a trigger arises, the victim of childhood sexual abuse may unconsciously utilize denial to survive. "Denial" is classified as "the avoidance of awareness of some painful external reality . . . accomplished by *withholding conscious understanding of the meaning and implications* of what is perceived."[44] Stated more succinctly, in order for the child victim to avoid mental breakdown, the defense mechanism of denial prohibits the conscious mind from examining or integrating the acts of child abuse into the child's daily experience. Or, more illustratively, the child's mind splits the abuse off from normal life and compartmentalizes it.[45] In that way, the child can continue to function in the pres-

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haviors, 144 AM. J. PSYCHIATRY 1431, 1434-36 (1987); Sandrine Pirard et al., Abstract, *Prevalence of Physical and Sexual Abuse Among Substance Abuse Patients and Impact on Treatment Outcomes*, 78 DRUG & ALCOHOL DEPENDENCE 57, 57 (2005), *available at* http://www.sciencedirect.com ("More than half of substance abusers entering addiction treatment report a history of physical or sexual abuse."); Schoettle, *supra* note 39, at 296.

42 M. Glasser et al., *Cycle of Child Sexual Abuse: Links Between Being a Victim and Becoming a Perpetrator,* 179 BRIT. J. PSYCHIATRY 482, 482-93 (2001); Theoharis K. Seghorn et al., *Childhood Sexual Abuse in the Lives of Sexually Aggressive Offenders*, 26 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 262, 262 (1987).

43 Rebecca L. Thomas, Note, *Adult Survivors of Childhood Sexual Abuse and Statutes of Limitations: A Call for Legislative Action*, 26 WAKE FOREST L. REV. 1245, 1254 (1991).

44 *Id.* at n.74 (quoting Mardi J. Horowitz et al., *A Classification Theory of Defense*, *in* REPRESSION & DISASSOCIATION 60, 80 (Jerome L. Singer ed., 1990)) (emphasis added).

45 Laura Johnson, *Litigating Nightmares: Repressed Memories of Childhood Sexual Abuse*, 51 S.C. L. REV. 939, 942 (2000) ("Sigmund Freud first proposed the theory of a 'defense mechanism that serves to repudiate or suppress emotions, needs, feelings or intentions in order to prevent psychic "pain."' " (quoting ELIZABETH LOFTUS & KATHERINE KETCHAM, THE MYTH OF REPRESSED MEMORY: FALSE MEMORIES AND ALLEGATIONS OF SEXUAL ABUSE 50 (1996))); *see also* Viens, *supra* note 34, at 180 ("Although victim memory repression adds to the widespread unreporting and thus dearth of prosecution of childhood sexual abuse, the more common causes of unreporting tend to be fear, shame, embarrassment, confusion, denial, or some other psychological phenomenon which prevents the victim from addressing their abuse.").

ence of a trusted abuser knowing that he has been sexually abused and is likely to be abused again.

As with Fr. Tony and Stephen Connors, the typical civil suit brought by adult survivors of child abuse is not usually based on what would be called a forcible rape. Often, a child turns to a trusted adult for guidance and strength in a search for a father figure.[46] To seduce children, pedophiles use "grooming," a progressive series of actions that operate on a continuum. From the outside, from the victim's perspective, or even to the abuser's twisted mind, this can look very much like friendship, coaching, youth pastoring, or Scout leadership. For Fr. Tony, St. Peter's Guild and fishing were very convenient tools of grooming. From the innocuous grooming, which is often indistinguishable and undifferentiated from the abuser's appointed role, the abuser begins to cross boundaries with the child, both professional and physical.[47] Often, the boundary violations start with giving the child alcohol and then advance to a touch to the inner thigh or perhaps a massage. It is but a short step for an abuser to sexually abuse the child.

After the abuse itself, the victims are frequently the last to speak up. As one author described it:

> Childhood sexual abuse is the darkest of secrets, relegated to silence through the most vile forms of trickery, threats and abuse of trust. Since the molester frequently is a role model or

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[46] Thomas, *supra* note 43, at 1251 n.56 ("*[G]reater* trauma has consistently been documented from experiences involving fathers, father-figures or stepfathers.").

[47] DSM-IV-TR makes reference to the activity commonly known as "grooming" as follows:

> Others, particularly those who frequently victimize children, develop complicated techniques for obtaining access to children, which may include winning the trust of a child's mother, marrying a woman with an attractive child, [or] trading children with other individuals with Pedophilia . . . . [T]he person may be attentive to the child's needs in order to gain the child's affection, interest, and loyalty and to prevent the child from reporting the sexual activity.

DSM-IV-TR, *supra* note 35, at 571.

For more on grooming, see BOYLE, *supra* note 38, at 47-48; MARIE M. FORTUNE, IS NOTHING SACRED: WHEN SEX INVADES THE PASTORAL RELATIONSHIP (1989); GLEN O. GABBORD, SEXUAL EXPLOITATION IN PROFESSIONAL RELATIONSHIPS (1989); and PETER RUTTER, SEX IN THE FORBIDDEN ZONE: WHEN MEN IN POWER—THERAPISTS, DOCTORS, CLERGY, TEACHERS, AND OTHERS—BETRAY WOMEN'S TRUST (1989). For grooming in the context of priests and their young charges, see JASON BERRY, LEAD US NOT INTO TEMPTATION: CATHOLIC PRIESTS AND THE SEXUAL ABUSE OF CHILDREN (1992); A.W. RICHARD SIPE, SEX, PRIESTS, AND POWER: ANATOMY OF A CRISIS (1995); and VAN DAM, *supra* note 37.

> other trusted figure . . . the child is reluctant to act contrary to any demands placed upon her. . . . Thus, the child's dependency and innocence are abused to prevent recognition or revelation of the abuse. For many children trapped in the netherworld of sexual abuse, revealing the secret is never an option.[48]

In the mind of an abused child, there is simply no one to tell.

Indeed, it is not unusual for child abuse survivors to go decades before confronting the compartmentalized abuse and its effect in their lives.[49] According to the scientific literature, the "triggering event" that allows the victim to deal with his abuse can be varied, but typically it is a significant life event that causes intense reflection or replicates the environment of the abuse.[50]

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[48] Thomas, *supra* note 43, at 1250. **R**

[49] *See id.* at 1255 ("[O]ne study of 365 adult survivors found that, on the average, survivors entered therapy *17 years* after the abuse terminated."). The overwhelming weight of recent psychological research and scholarship on the discovery of childhood sexual abuse by its victims makes clear the substantial time generally required by victims to come to grips with the abuse and to recognize its impact. *See* JOHN CREWDSON, BY SILENCE BETRAYED: SEXUAL ABUSE OF CHILDREN IN AMERICA (1988); DAVID HECHLER, THE BATTLE AND THE BACKLASH: THE CHILD SEXUAL ABUSE WAR (1988).

The Senate Judiciary Committee minutes contain the testimony of Jean Sherkoff, psychotherapist, from Lutheran Family Services: "Many victims are in their late 20's or early 30's before they are able to identify [child sexual abuse] as a precursor to the problems in their lives." *Hearings on H.B. 2668 Before the Senate Comm. on Judiciary*, 65th Or. Legis. Ass'y (May 24, 1989), Minutes at 251. *See also id.* at Exhibit "T" (testimony of Lorah Sebastian).

Often, experience shows, identifying sexual abuse as the source of one's problems may even occur in middle age. *See* Johnson, *supra* note 45, at 942. Additionally,

> [t]he four stages of human memory are: "encoding, consolidation, storage and retrieval." "Repression is the 'forcing of ideas, perceptions or memories associated with psychic trauma from conscious awareness into the unconscious.'" While there is a consensus among psychiatric experts that [repressed memory syndrome] is a legitimate medical condition, there is no such consensus as to the incidence of RMS in patients. Repression of memories of abuse may provide the victims with short-term coping benefits, however, the abuse may still result in emotional and psychological effects in the long-term. Some victims of child sexual abuse who have repressed memory of the abuse will live out the remainder of their lives and never recall the abuse. For many abuse victims, however, the memory of their abuse will randomly resurface in their consciousness many years later as a result of some "triggering mechanism." . . . Aside from RMS, victims employ various other "defense mechanisms to deal with the trauma of the abuse, such as denial . . . and blocking out [of] a period of childhood, a person, a place, or the more painful aspects of [the] abuse."

Viens, *supra* note 34, at 176-77 n.50 (citations omitted).

[50] "The resurfacing of the victim's repressed memory may be prompted by 'a television show on child sexual abuse, contact with an unrelated case of abuse, or experiencing a scene similar to one associated with the repressed images.'" Viens, *supra*

All Stephen Connors needed to break open the secret was to see Fr. Tony Rossi's picture in the newspaper—forty years later.

Given the reality of a long delay in realizing harm from child abuse, ORS 12.117 simply bows to the fact that that child abuse victims have meritorious claims against their abusers and that vulnerable, violated children do not come forward against a trusted figure who sexually abuses them. Instead the child compartmentalizes the abuse and tends to act out with drugs, sex, or other risky behavior. These behaviors begin a long road of mental health problems that the victim, because of avoidance, cannot connect with the abuse until well into adulthood.

Therefore, the "why" of using the extended statute of limitations against a church boils down to the fact that a person functioning at the emotional level of a child—no matter what age—cannot then recognize the three requisite elements of tort, injury, and causation. As a result, more and more states have adopted extended statutes of limitations for child abuse actions.[51] And perhaps not surprisingly—but a disappointment nonetheless—the Roman Catholic Church is often at the forefront of opposition to such legislation.[52]

We have now seen the elements that create the background for a classic case of priest sexual abuse illustrated here by Stephen's claims against the Johannines and the Archdiocese for the abuse by Fr. Tony. Furthermore, we have examined the reason for an extended statute of limitations and the devastation that childhood sexual abuse wreaks in the lives of its victims. Thus, we may now turn to the many arguments made by the Church and the many issues arising in these cases that center on questions of religious freedom and burdens on religious practice.

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note 34, at 177 n.50 (quoting Gary M. Ernsdorff & Elizabeth F. Loftus, *Let Sleeping Memories Lie? Words of Caution About Tolling the Statute of Limitations in Cases of Memory Repression*, 84 J. CRIM. L. & CRIMINOLOGY 129, 138 (1993)). In addition to adult sexual activity, things such as a job promotion or the victim's child reaching the age at which the victim was abused have been noted as triggers. Jasmin v. Ross, 177 Or. App. 210, 212–13, 33 P.3d 725, 725-26 (2001) (recognition of injury from abuse by step-uncle triggered by discussions with former high school confidant approximately twelve years after the last incident of sexual contact); Thomas, *supra* note 43, at 1254 n.78 (collecting cases).

[51] *See* Jorge L. Carro & Joseph V. Hatala, *Recovered Memories, Extended Statutes of Limitations and Discovery Exceptions in Childhood Sexual Abuse Cases: Have We Gone Too Far?*, 23 PEPP. L. REV. 1239, 1250 n.54 (1996) (listing statutes that extend the statute of limitations for sexual abuse claims).

[52] *See* Chaput, *supra* note 25.

III

How Imposing Liability on Churches Can Impact Religious Liberty

Applying respondeat superior and negligence to the Church for sex abuse of minors by the Church's priests could arguably have some impact on religious liberty. Respondeat superior liability raises two significant concerns about a court imposing liability for a violation of the priestly relationship. Likewise, negligence also raises two religious liberty issues, which in both cases results from the imposition of secular standards of care on redemptive religious institutions. The following discussion will examine this impact and the specific concerns each doctrine can create by imposing liability for the violation of a priest-parishioner relationship

A. Respondeat Superior Liability and the Religious Liberty Issues It Raises

As in other locales, respondeat superior liability in Oregon is imposed without independent fault on a principal for torts of its agents that occur in the course and scope of the agency or employment. Under the Oregon Supreme Court case *Chesterman v. Barmon*, there are three elements to the course and scope analysis in Oregon: the act (1) must occur in the time and space limits of employment or agency; (2) must have been motivated, at least in part, to serve the interests of the employer; and (3) must be of a kind the employee or agent was authorized to perform.[53]

Typically, of course, intentional torts are not within the course and scope of any job.[54] Therefore, in the priest abuse context, the Oregon Supreme Court has allowed juries to hold organiza-

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[53] 305 Or. 439, 442, 753 P.2d 404, 406 (1988). In *Chesterman*, an employer was held liable for a sexual assault committed by one of its drivers as a result of the driver taking a hallucinogenic drug to stay awake on the job. *Id.* at 441, 753 P.2d at 405.

[54] *See* Fearing v. Bucher, 328 Or. 367, 375-76, 977 P.2d 1163, 1167 (1999). In *Fearing*, the Oregon Supreme Court stated:

> [I]n the intentional tort context, it usually is inappropriate for the court to base its decision regarding the adequacy of the complaint on whether the complaint contains allegations that the intentional tort *itself* was committed in furtherance of any interest of the employer or was of the same kind of activities that the employee was hired to perform. Such circumstances rarely will occur and are not, in any event, necessary to vicarious liability. Rather, the focus properly is directed at whether the complaint contains sufficient allegations . . . [that the priest's] *conduct that was within the scope*

tions liable for child sex abuse—which is by definition outside the *Chesterman* "scope of employment"—where the employee's authorized duties resulted in or were a causal factor in the abuse.[55] Without the job, the theory goes, the abuse would not have occurred. The "grooming" of a child abuse victim by an adult who is in a position of trust is a typical precursor to abuse, and many activities that constitute typical grooming behavior (befriending, guidance, mentoring, education, etc.) are within the recognized duties of a priest. Thus, "a jury could infer that . . . sexual assaults [by a priest] were the culmination of a progressive series of actions that began with and continued to involve [the priest's] performance of the ordinary and authorized duties of a priest."[56] In this way, churches are liable for sexual abuse by priests because they employ and authorize priests to befriend and care for children and teenagers. And when these relationships result in harm, the social risk analysis described above[57] justifies holding a church vicariously liable.

Although the underlying abuse case is typically framed as a battery action,[58] a respondeat superior claim against the Church can also just as appropriately be framed as a claim against the priest for the tort of intentional infliction of emotional distress.[59] Either way, such respondeat superior liability claims raise religious liberty concerns at two points. First, concerns arise at the imposition of a kind of strict liability for abuse that was the result of a religiously mandated trust relationship. And second, religious liberties are at issue when defining the duties of a priest, that is, asking a secular jury to determine what aspects of a trust rela-

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> *of his employment . . . arguably resulted in the acts that caused plaintiff's injury*.

Id. (second emphasis added).

[55] *Id.* at 376, 977 P.2d at 1167 (Catholic Church); *accord* Lourim v. Swensen, 328 Or. 380, 388, 977 P.2d 1157, 1161 (1999) (Boy Scouts).

[56] *Fearing*, 328 Or. at 375, 977 P.2d at 1167.

[57] *See* discussion *supra* Part I.B.

[58] Battery in Oregon is defined as a nonconsensual or offensive touching. Bakker v. Baza'r, Inc., 275 Or. 245, 249, 551 P.2d 1269, 1271 (1976).

[59] The following are the three elements of IIED in Oregon:

> (1) that defendants intended to cause plaintiff severe emotional distress or knew with substantial certainty that their conduct would cause such distress; (2) that defendants engaged in outrageous conduct—*i.e.*, conduct extraordinarily beyond the bounds of socially tolerable behavior; and (3) that defendants' conduct in fact caused plaintiff severe emotional distress.

Checkley v. Boyd, 198 Or. App. 110, 124, 107 P.3d 651, 660 (citing McGanty v. Staudenraus, 321 Or. 532, 543, 550, 901 P.2d 841, 852 (1995)), *review denied*, 383 Or. 583 (2005) .

tionship were within the course and scope of a priest or other religious employee.

1. Oregon's Imposition of Strict Liability for a Trust Relationship that Results in Sexual Abuse

Under *Fearing v. Bucher* both the tortious acts themselves and the precursor activities that result in the tort (i.e., grooming) are analyzed in the course and scope analysis. Religious liberty concerns are therefore implicated, the argument goes, because secular respondeat superior law improperly assigns liability to what are normally considered religious, priestly functions of a facially nontortious nature. Or at least that is how the Church sees it. As one defense counsel quipped in summary judgment briefing, *Fearing* created "the tort of getting to know you."[60]

However, styling respondeat superior liability in the priest abuse context as "the tort of getting to know you" is obvious hyperbole. An adult's grooming of a child within a trust relationship is a typical precursor to abuse, and typical grooming behavior—*from the perspective of the child*—looks very like the recognized duties of a priest (i.e., befriend, guide, mentor, and educate). The Church's liability attaches to the priest's grooming behavior only when it results in sexual abuse of the child. There is no "tort of getting to know you"—a tort only accrues when a priest uses the trust relationship to abuse a child. Because the position of trust is central to the employment of priests, and because the manipulation of the trust relationship is how the priest is able to molest a child, the *Fearing* theory creates no special imposition on religious belief or practice. Liability would be no different in the case of, say, the drunken driving of a bus driver who was in the scope of his job driving kids home.[61]

In response to *Fearing*-style liability, the Church has sometimes argued that imposition of respondeat superior for priestly actions that result in sexual abuse places a burden on the free

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[60] Archdiocese Defendants' Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Partial Summary Judgment at 30-31, D.A. v. Archdiocese of Portland, No. 0107-07465 (Multnomah County Cir. Ct. Jan. 22, 2002).

[61] For instance, there is no argument that the Church would be liable for a priest who molested a child he found by chance on a playground with no trust relationship preceding the abuse—say the child did not even know this was a priest. The Church is not responsible for every tortious action of its priests but only, under *Fearing*, for those that arise from the trust relationship sponsored by the Church. *See* 328 Or. at 377, 977 P.2d at 1168 (1999).

exercise of religion by making such priestly interactions subject to secular scrutiny. When first raising this defense in the winter of 1999 to 2000, the Archdiocese of Portland suggested that strict scrutiny under *Sherbert v. Verner*[62] should be applied to the imposition of respondeat superior under Oregon law.[63]

But closer inspection showed that the proper test for Free Exercise challenges to state law was found in *Employment Division, Department of Human Resources of Oregon v. Smith*,[64] and under that standard, the Church would have to demonstrate a Free Exercise burden coupled with a second "hybrid" right in order to trigger strict scrutiny.[65] Yet even under such strict scrutiny, it is a difficult argument to assert that the case-by-case imposition of respondeat superior liability is somehow not narrowly tailored to achieve the compelling government interest of protecting children from abuse.[66] Even assuming a significant burden on religious practice, imposition of liability would be wholly dependent on the facts of a particular priest's abuse of a particular child.

In fact, the laws that have failed to meet Free Exercise strict scrutiny have been those that have applied a specific rule without flexibility for particular holy days,[67] child rearing methods,[68] or

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[62] 374 U.S. 398 (1963).

[63] The enactment of the Religious Freedom Restoration Act (RFRA) and the subsequent Supreme Court invalidation of RFRA with respect to state laws occurred prior to the filing of these motions, so there was little merit to the contention that RFRA had reestablished the strict scrutiny test in the realm of state law. *See* Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[64] 494 U.S. 872, 878-82 (1990) (holding that facially neutral, generally applicable laws that incidentally implicate religious beliefs are valid unless religious activity is paired with another independent constitutional right).

[65] *Id.* at 881 ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections . . . ."); *see also* discussion *supra* Part III.A.

[66] The compelling interest test is comprised of three basic elements: a law that imposes (1) a substantial burden on religious practice (2) must be narrowly tailored (3) to serve a compelling government interest. *See, e.g.*, *Sherbert*, 374 U.S. at 403-09.

[67] *Id.* at 409-10.

[68] *See* Wisconsin v. Yoder, 406 U.S. 205, 207 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school).

proselytizing methods.[69] Given this case law, a jury's ad hoc examination of an individual priest's behavior would seem the most narrow way in which one could further the governmental or societal interest in providing restitution through the civil justice system for child abuse victims of clergy. Indeed, through deliberation juries could decide whether that particular priest was motivated at least in part to serve the Archdiocese within the course and scope of his employment.

Despite the Church's objections, the imposition of respondeat superior liability on religious activity is a reasonable response to the reality of priest sexual abuse of children for several reasons. First, the Church is on balance better equipped to deal with selection, training, and supervision of its priests. Indeed, the Church makes boys and men into priests. Second, by perpetuating the institution of the priesthood and by establishing doctrines that make the priest *in personam Christi*, the Church places priests in a position of ultimate trust and authority over parishioners. In particular, children, with their absolute faith and trust, are strongly conditioned to obey priests.

Third, and most centrally, allowing the Church to accept these benefits while washing their hands of malefactors would be plainly unjust. Undoubtedly there is something to Dr. Thomas Baty's and Judge Posner's observation that respondeat superior follows so-called deep pockets.[70] But this is not so much purely mercenary as it is a recognition that it is preferable for an institution with significant assets and ongoing goodwill to provide redress for profound and lasting injury to a child, rather than leaving the child emotionally broken and without resources or restitution. In the bus driver scenario, even though the driver was not supposed to drink while driving, how unjust would it be for the Church not to be financially responsible for the damages incurred by the injured school children?

Beyond that—and often forgotten in such discussions—a plaintiff must still convince a jury of his peers that it is just under all the circumstances to impose liability on the Church when, by

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[69] *See* Murdock v. Pennsylvania, 319 U.S. 105, 112-14 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); Cantwell v. Connecticut, 310 U.S. 296, 304-07 (1940) (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious).

[70] BATY, *supra* note 10; RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 6.8, at 204-05 (5th ed. 1998).

definition, the Church hierarchy itself did nothing wrong. *Fearing* is not actually *strict* liability. The ultimate gatekeepers of justice are a jury. If the result of an award is unjust in a particular case, let the Church so argue, and let us remember that a jury is in a perfect position to correct any such injustice. That is what we trust juries to do.

2. The Problem of Defining the Duties of a Priest

The other religious liberty challenge to imposing respondeat superior liability stems from the *Chesterman* analysis of course and scope.[71] Specifically, how does one ask a secular jury to determine what actions are in the "time and space limits" of employment and what actions are "of a kind the [priest] was hired to perform"?[72] The Church has argued that for a secular court or jury to define what is and is not included in the duties of a priest necessarily implicates the doctrine of ecclesiastical abstention and thereby runs afoul of the First Amendment.[73] At first blush, this argument would seem to carry some weight in that a court is being called on to determine if a priest's actions conformed to his religious obligations, which in turn obviously requires an examination into the tenets of a religion. This is getting into admittedly delicate territory for anyone who values religious freedom. And yet, courts have never been required totally to abstain from cases where religious tenets are merely involved so long as the court does not adjudicate the correctness or orthodoxy of religious belief or practice.

Ecclesiastical abstention is a well-established doctrine, but it would be misapplied if used to shield the Church from civil tort liability in the priest abuse cases. The religious autonomy or ecclesiastical abstention doctrine under the First Amendment asserts that secular courts should not resolve disputes about religious dogma or custom.[74] But the universal rule, including

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[71] *See supra* note 53 and accompanying text.

[72] Chesterman v. Barmon, 305 Or. 439, 442, 753 P.2d 404, 406 (1988) (describing requirements necessary to conclude that an employee was acting within the scope of employment).

[73] The use of the abstention doctrine is typified in the case of *Serbian Eastern Orthodox Diocese v. Milivojevich*. 426 U.S. 696 (1976). *Milivojevich* recognized that secular courts cannot determine who is the proper bishop in a diocese where the contending successors to the seat are disputing the other's claim by resorting to church law. *Id.* at 712-13. *See* discussion *infra* Part III.B.

[74] *See, e.g.*, *Milivojevich*, 426 U.S. at 720 (refusing to determine who is proper bishop); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian

the rule in Oregon, is that courts may exercise jurisdiction over religious bodies in secular matters, including tort cases.[75] Nearly every other jurisdiction has refused to exempt religious institutions from liability for torts by clergy on abstention grounds.[76] Nothing in case law would suggest that respondeat superior liability or negligence of a Church should be exempt from judicial inquiry because of abstention considerations. Indeed, the ecclesiastical abstention doctrine springs from sound notions of nonentanglement, not *noninvolvement*. And a court's observance or recognition of a priest's Church-defined duties (as opposed to an interpretation or definition of these duties) in no way places the state's imprimatur on religious practice.[77]

A suit claiming sexual abuse of a child does not require a court

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Church, 393 U.S. 440, 449 (1969) (refusing to say which group in split denomination is rightful owner of property).

[75] *See* Christofferson v. Church of Scientology of Portland, 57 Or. App. 203, 241, 644 P.2d 577, 601, *review denied*, 293 Or. 456 (1982) ("[A] religious organization, merely because it is such, is not shielded by the First Amendment from all liability for [the tort of] fraud.").

[76] *See* Smith v. O'Connell, 986 F. Supp. 73, 76-77 (D.R.I. 1997) (holding that the religious autonomy doctrine and First Amendment jurisprudence do not require dismissal of sexual assault charges against clergy); *id.* at 77 ("[T]he First Amendment [only] prohibits judicial interference with internal church matters that require an interpretation of religious doctrine."); Moses v. Diocese of Colo., 863 P.2d 310, 320 (Colo. 1993) ("Application of a secular standard to secular conduct that is tortious is not prohibited by the Constitution."); Rosado v. Bridgeport Roman Catholic Diocesan Corp., 716 A.2d 967, 970 (Conn. Super. Ct. 1998) ("[D]etermination of . . . negligent supervision . . . would not prejudice or impose upon any of the religious tenets or practices of Catholicism."); Gibson v. Brewer, 952 S.W.2d 239, 248 (Mo. 1997) ("Religious conduct intended or certain to cause harm need not be tolerated under the First Amendment."); Kenneth R. v. Roman Catholic Diocese of Brooklyn, 654 N.Y.S.2d 791, 796 (App. Div. 1997) ("The First Amendment does not grant religious organizations absolute immunity from tort liability."); C.J.C. v. Corp. of the Catholic Bishop of Yakima, 985 P.2d 262, 277 (Wash. 1999) ("The First Amendment does not provide churches with absolute immunity to engage in tortious conduct. So long as liability is predicated on secular conduct and does not involve the interpretation of church doctrine or religious beliefs, it does not offend constitutional principles."); *cf.*, *Presbyterian Church*, 393 U.S. at 449 ("Civil courts do not inhibit free exercise of religion merely by opening their doors to [secular] disputes involving church property."). However, because an examination of the obligation a priest owes to his penitents may involve doctrinal questions, one court was reluctant to define the fiduciary duties of a priest. *See* H.R.B. v. J.L.G., 913 S.W.2d 92, 98-99 (Mo. Ct. App. 1995).

[77] *See* Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 367-68 (1970) (holding that applying "state statutory law governing the holding of property by religious corporations, . . . language in the deeds conveying the properties[,] . . . the terms of the charters of the corporations, and [the] provisions in the constitution of the General Eldership pertinent to the ownership and control of church property" was constitutionally acceptable, because

to decide whether a Church departed from the true faith, as in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*,[78] nor which faction represents the true apostolic succession, as in *Serbian Eastern Orthodox Diocese v. Milivojevich*.[79] Indeed, an evaluation of the direct supervision of priests has been found to be within the ambit of the courts.[80] For example, in *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, the court treated "religious principles as facts" in trying a fiduciary duty claim.[81] To be sure, "looking at" religious duties is not the same as "interfering in,"[82] or interpreting[83] religious belief. And imposing liability because the sexual conduct resulted from the precursor activity is not imposing liability for that activity.

Additionally, it would seem from case law that the ecclesiastical abstention approach to resolving disputes involving religious parties requires religious disputants on both sides.[84] Child abuse plaintiffs are typically not disputing the propriety of any religious decision nor challenging whether the Church acted in accordance with the victim's interpretation of Roman Catholicism. In fact, the Ninth Circuit has noted that the ecclesiastical abstention doc-

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"resolution of the dispute involved no inquiry into religious doctrine" (citations omitted)).

[78] 393 U.S. at 449-50.

[79] 426 U.S. at 709-10.

[80] Gray v. Ward, 950 S.W.2d 232, 234 (Mo. 1997). Also, according to the Second Circuit:

> Where a person's beliefs . . . give rise to a special legal relationship between him and his church, we may be required to consider with other relevant evidence the nature of that person's beliefs . . . . In doing so, we judge nothing to be heresy, support no dogma, and acknowledge no beliefs or practices of any sect to be the law.

Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409, 431 (2d Cir. 1999).

[81] 196 F.3d at 431.

[82] Swanson v. Roman Catholic Bishop of Portland, 1997 ME 63, ¶ 7, 692 A.2d 441, 443.

[83] Smith v. O'Connell, 986 F. Supp. 73, 76-77 (D.R.I. 1997).

[84] *See, e.g.*, Little v. First Baptist Church, 475 U.S. 1148, 1148-49 (1986) (pastor seeking to be retained); Jones v. Wolf, 443 U.S. 595, 602-04 (1979) (church members fighting over church property); *Milivojevich*, 426 U.S. at 704 (bishop demanding recognition from church body); Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 367-68 (1970) (hierarchical organization seeking to retain church property from breakaway churches); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 445-452 (1969) (same); Watson v. Jones, 80 U.S. (13 Wall.) 679, 681-83 (1872) (groups of parishioners fighting over ownership of church property).

trine does not apply in parishioner-church tort suits.[85]

Certainly, the ecclesiastical abstention doctrine can apply in parishioner discipline cases. However, these are parishioners who have consented to abide by the defendant's policies. Unlike the cases where parishioners protest "shunning,"[86] "marking,"[87] or excommunication,[88] child abuse plaintiffs do not object to the operation of church law or discipline on themselves.[89] Minor parishioners cannot be said to assume the risk of sexual abuse by pedophile priests through their consent to being members of the Church in the way parishioners consent to the threat of excommunication.

Recently, one state supreme court went so far as to order a church election on the retention of a pastor so long as it followed the church's own internal procedures.[90] Because a child abuse victim is not disputing what the proper role or duties of a priest *should be* as a matter of religious doctrine, the ecclesiastical abstention doctrine does not block Oregon's respondeat superior liability in the priest abuse context. Child abuse victims essentially tell a jury that, accepting the religious documents of the Church at face value, the duties of a priest include the kind of

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[85] The Ninth Circuit has stated:

> Ecclesiastical abstention thus provides that civil courts may not redetermine the correctness of an interpretation of canonical text or some decision relating to government of the religious polity. Rather, we must accept as a given whatever the entity decides. . . .
>
> *This limited abstention doctrine is not relevant here because [the plaintiff] is not alleging that the new rules governing disassociation are improper under Church law. . . . Nor does she seek relief for having been "wrongfully" disfellowshiped.* Rather, she seeks relief for the harms she has suffered as a result of conduct engaged in by the Jehovah's Witnesses that is presumably consistent with the governing law of the Church. *Accordingly, the doctrine of* Serbian Orthodox Diocese *does not apply*.

Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc., 819 F.2d 875, 878 n.1 (9th Cir. 1987) (citations omitted) (emphasis added).

[86] *Id.* at 876.

[87] "Marking" is the public disclosure of intimately revealed transgressions. Hadnot v. Shaw, 826 P.2d 978, 980-81 (Okla. 1992); *see also* Smith v. Calvary Christian Church, 614 N.W.2d 590, 591 (Mich. 2000).

[88] O'Connor v. Diocese of Honolulu, 885 P.2d 361, 362 (Haw. 1994).

[89] *See Paul*, 819 F.2d at 883 ("Churches are afforded great latitude when they impose discipline on members or former members."). *But see* Bear v. Reformed Mennonite Church, 341 A.2d 105, 107-08 (Pa. 1975) (refusing to dismiss case because "shunning" might cause excessive interference with marital and familial relations and operation of business).

[90] Pilgrim Rest Missionary Baptist Church v. Wallace, 2002-CA-00070-SCT (¶ 11) (Miss. 2003).

trust relationship that can be used and was used for grooming purposes. When that behavior does result in molestation of a child, the secular, religiously neutral standard of respondeat superior liability will apply.

B. Negligence, the Use of Secular Standards of Care for Redemptive Institutions, and the Problems with Asking How the Church Got Its Information

A negligence claim in Oregon must include the following elements:

> (1) that defendant's conduct caused a foreseeable risk of harm, (2) that the risk is to an interest of a kind that the law protects against negligent invasion, (3) that defendant's conduct was unreasonable in light of the risk, (4) that the conduct was a cause of plaintiff's harm, and (5) that plaintiff was within the class of persons and plaintiff's injury was within the general type of potential incidents and injuries that made defendant's conduct negligent.[91]

Thus in Oregon, foreseeability takes the place of the more traditional common law duty of care. Beyond that, if the plaintiff invokes a special status, relationship, or standard of conduct unique to the defendant, then that relationship may create, define, or limit the defendant's actual duty to the plaintiff.[92]

In priest abuse cases, the arguments for finding negligence are twofold. First, additional instances of abuse are reasonably foreseeable when a particular person or priest offends once. Second, the trust relationship between the Church and its child parishioners serves to define a duty of the Church either to remove such persons from positions involving children or to provide clear warnings to parishioners and strict oversight of the priests in any potentially dangerous reassignment.

Turning now to a discussion of religious liberty issues in the context of negligence, a brief survey reveals that they are several, subtle, and interesting:

1. The question of whether Church members may in some sense be said to have waived secular standards of reasonable conduct in light of Church membership, as some Church lawyers have argued;

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[91] Solberg v. Johnson, 306 Or. 484, 490-91, 760 P.2d 867, 870 (1988).

[92] Or. Steel Mills, Inc. v. Coopers & Lybrand, L.L.P., 336 Or. 329, 340-41, 83 P.3d 322, 328 (2004).

2. The question of whether a secular jury should decide standards of reasonable conduct when such conduct may have been driven by religious belief;

3. The many questions arising from an inquiry into how the Church hierarchy knows what it knows about a particular troublesome priest and whether such knowledge can be rightly considered confidential; and

4. The question of whether punitive damages are a violation of religious liberty because of their potential to cause serious economic damage to the Church and its charitable mission.

For in the intersection of civil liability and religious belief, the devil—to borrow a metaphor—is in the details. At least so the Church would argue. And yet, even in the trenches of civil litigation, an appropriate respect for the claims of religious practice need not prevent the search for justice from going forward if the issues are properly understood and framed.

1. Waiver of the Secular Standard of Care by Membership in a Religious Organization

On occasion, the Church has attempted to argue that because parishioners were members of the Church as an institution, they in essence consented to Church practice concerning the absolute authority of bishops to assign, discipline, and remove priests.[93] In a sense, the argument is that the victims, or their families, were not really third persons but were, in fact, part of the defendant Church. Therefore they can be said to have waived the right to complain about decisions that were made by the Church. Conceptually, this idea is the exact opposite of a special duty of care imposed on a church that invites the participation and membership of minors and their families.

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[93] For example, the Archdiocese of Portland made this troubling argument within the context of its bankruptcy case, attempting to persuade the court that the "church autonomy doctrine" barred that court from applying civil law to issues the Archdiocese argued were controlled by canon law. Debtor's Reply Brief in Support of its Cross Motion for Partial Summary Judgment, *In re* Roman Catholic Archbishop of Portland, 335 B.R. 815 (Bankr. D. Or. 2005) (No. 04-37154-elp11, Adv. Proc. No. 04-03292-elp). As support, the Archdiocese argued that the tort claimants were in the wrong venue—that their claims did not belong in a secular court because they had "impliedly consented to Catholic Church Doctrine or polity," pointing out that "at the time of their alleged sexual misconduct, [tort claimants] were members of or associated with the Roman Catholic Church, primarily through attendance at a Catholic school and/or parish church within the Archdiocese." *Id.* at 11 (quoting Second Declaration of Margaret Hoffmann).

To impose a secular standard on the Church in light of these accepted tenets, the Church argues, would be to ignore the conscious decision made by parishioners to abide by Church rules, which in essence is a waiver. This argument, if serious, has numerous problems. First, it is basic law that any waiver must be knowing.[94] It would be hard to find a Catholic family anywhere, anytime, that would say they understood that, by joining the Church, they were waiving any legal claims that might arise from wrongdoing by Church officials against their children. Indeed, this argument is similar to the protections that Native American tribes, enjoying sovereign immunity, make concerning injuries arising on tribal land: you cannot bring suit because you were here voluntarily. The only difference being that the Roman Catholic Church has no such sovereign immunity, at least in the United States.[95]

Second, the argument would need to be applied to the victim—obviously a minor at the time of the abuse. It is nonsensical to argue that a child who was not old enough as a matter of law to consent to sexual activity was competent enough to waive legal rights. Perhaps such arguments will prove to be one-time trial balloons made in the desperation of a bankruptcy case rather than considered positions of the Church.

2. Application of the Foreseeability/Duty of Care Standard

The application of the foreseeability standard under Oregon's rule of negligence might be problematic for religious liberty in

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[94] *In re* Marriage of Woods, 207 Or. App. 452, 460, 142 P.3d 1072, 1077 (2006) ("[A]dults with the capacity to do so generally are free to waive a panoply of rights, statutory and constitutional, so long as the waiver is knowing and intentional." (citing *In re* Marriage of McInnis, 199 Or. App. 223, 236, 110 P.3d 639, 645 (2005))); DK Inv. Co. v. Inter-Pacific Dev. Co., 195 Or. App. 256, 263, 97 P.3d 675, 679-80 (2004).

[95] The individual dioceses and archdioceses have no claim to sovereign status. The Holy See, the political manifestation of the Vatican, does possess sovereign immunity under the Foreign Sovereign Immunities Act (FSIA). 28 U.S.C. §§ 1602-1611 (2000). *Cf.* Kline v. Kaneko, 685 F. Supp. 386, 390-92 (S.D.N.Y. 1988) (outlining FSIA exceptions in section 1605 relating to commercial activities, taking of property, and noncommercial torts involving the sovereign as a party); Rios v. Marshall, 530 F. Supp. 351, 371 (S.D.N.Y. 1981) (stating that under the FSIA, "foreign states are granted immunity from the jurisdiction of courts of this nation with respect to their public or governmental acts but not with respect to their commercial acts"). However, Judge Michael Mosman of the United States District Court for the District of Oregon ruled on June 7, 2006, that the Holy See was subject to suit under the FSIA commercial activities exception. *See* Doe v. Holy See, 434 F. Supp. 2d 925, 947 (D. Or. 2006).

several ways. First, as a general matter, it is important to remember that the requirement of foreseeability does not mean a defendant must have actually foreseen the risk of danger.[96] Rather, a plaintiff can still succeed so long as he or she proves that the defendant should have known of the risk; that is, a reasonable person would have foreseen the risk. However, when applied to a bishop who, for example, transferred a subordinate clergyman who had confessed and repented of inappropriate sexual conduct with a child, the issue of whether a reasonable individual would have foreseen that risk becomes more difficult.

A reasonable secular person in the year 2006 (i.e., one who has read newspapers for at least five years and believes that child molesters are often habitual offenders with a low probability of reform) would undoubtedly foresee a risk once warned about such a priest's tendencies. But, for example, a clergyman in 1966 and steeped in religious doctrine that teaches repentance, forgiveness, and reform through a transformative divine grace, might reasonably have believed that the abusing clergyman will not reoffend because he has genuinely repented and been transformed. Fr. Dubois, it will be remembered, genuinely believed in change: he had himself been changed, and he believed Fr. Tony would be as well. Asking a secular jury to judge and evaluate this belief as reasonable or not has significant implications for religious liberty. The effect of such a ruling is to assume that the reasonable person is always secular, or worse, that the perspective of the devout religious belief is per se unreasonable.

This problematic implication of the foreseeability standard also arises under the third element of negligence in Oregon: the defendant's conduct was unreasonable in light of the risk. In the case of the transfer of a dangerous priest, the argument can be made that, even upon awareness of the risk, a reasonable clergyman might (based on his faith) take action to safeguard against the risk, yet that action could be insufficient in the eyes of the law's reasonable person. Fr. Dubois or the Bishop might believe that through regular confession, accountability, and prayer Fr. Tony will be able to deal with his problem. However, these safeguards that Fr. Dubois or the Bishop believed reasonable may

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[96] This analysis does not consider the implications of ORS 12.117's requirement that only actual knowledge will trigger the extension of time to file suit. *See* OR. REV. STAT. § 12.117(1) (2005).

well be insufficient under the watchful eyes of a civil jury applying the law's presumptively secular reasonable person standard.

The reasonableness standard applied to the conduct of the defendant might even require or suggest conduct that would be against Church teaching. For example, while a warning letter to parishioners might in some circumstances be required before a transfer under the secular reasonableness standard, it runs counter to the idea that a priest is a representative of Christ. As one bishop said in a deposition, he did not warn parishioners about a particular priest's past problems with children, because he feared the disclosure would harm the priest's reputation and hinder his effectiveness in ministry.[97]

True, a bishop might be able to arrive at solutions to the problem that are both secularly reasonable and consistent with Church doctrine. However, the point is that there are situations in which such a harmonious balance cannot be struck. In such situations a jury might expect that the bishop would subordinate sacraments, selection and assignment of clergy,[98] and fundamental doctrines of the faith (e.g., repentance, forgiveness, redemption, sanctification) to the needs of the situation.

But even so, the fundamental question remains: to what *degree* may the law inhibit the exercise of such beliefs from unabashedly impacting innocent third parties, even children? Remembering that no civil right is absolute, the standard answer for why such restrictions are constitutional is that "foreseeability," and by implication "reasonableness," is a basic element of a generally applicable tort law. And since foreseeability and reasonableness are neutrally applied, it survives constitutional review under the *Employment Division, Department of Human Resources of Oregon v. Smith*[99] test for the Free Exercise

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[97] The deposition was sealed by Court Order and therefore cannot be quoted or cited.

[98] *See* Schwartz & Lorber, *supra* note 22.

[99] The Supreme Court stated in *Smith*:

> It is a permissible reading of the [Free Exercise Clause] . . . to say that if prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.
>
> . . . .
>
> . . . To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs,

Clause.[100]

Courts have found that judicial review of negligence in employment decisions does not require looking into the subjective reasons for the decisions. Rather, it requires application of the more neutral concept of foreseeability, and as such, religious doctrine per se is not implicated.[101] While there are circumstances under which free exercise should not be impinged upon,[102] it can and should be that such burdens are justified when an overriding societal need is at issue, such as the protection of children or providing access to civil justice when children

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> "to become a law unto himself," contradicts both constitutional tradition and common sense.

494 U.S. 872, 878, 885 (1990) (quoting Reynolds v. United States 98 U.S. 145, 167 (1879)).

[100] *Cf.* Malicki v. Doe, 814 So. 2d 347, 363-64 (Fla. 2002) Also, one law review article stated:

> In *Malicki*, the respondents, a minor male and an adult female, brought suit against the Archdiocese of Miami, asserting that the Diocese's negligent hiring and supervision of a sexually abusive priest was the cause of their injuries. The Church sought dismissal of the claims, citing First Amendment religion protection. The court reasoned that allowing the claims to go forward would not violate the Free Exercise Clause because the generally applicable tort law was being neutrally applied. Furthermore, the court determined that adjudication of the claims would not involve excessive entanglement such as would violate the Establishment Clause. The court therefore concluded that the claims were not barred by the First Amendment.

Michael J. Sartor, Note, *Respondeat Superior, Intentional Torts, and Clergy Sexual Misconduct: The Implications of* Fearing v. Bucher, 62 WASH. & LEE L. REV. 687, 698 n.53 (2005) (citations omitted).

[101] According to Jana Satz Nugent:

> [C]laims based on negligence turn on the reasonable foreseeability of the cleric's misconduct and not on the religious institution's reasons for hiring or firing the cleric. Since the question of foreseeability does not implicate religious doctrine, the court found judicial scrutiny consistent with the Free Exercise Clause of the First Amendment.

Janna Satz Nugent, Note, *A Higher Authority: The Viability of Third Party Tort Actions Against a Religious Institution Grounded on Sexual Misconduct by a Member of the Clergy,* 30 FLA. ST. U. L. REV. 957, 982 (2003) (footnotes omitted).

[102] One Florida court stated:

> [W]e are persuaded that just as the State may prevent a church from offering human sacrifices, it may protect its children against injuries caused by pedophiles by authorizing civil damages against a church that knowingly . . . creates a situation in which such injuries are likely to occur. We recognize that the State's interest must be compelling indeed in order to interfere in the church's selection, training and assignment of its clerics. We would draw the line at criminal conduct.

Doe v. Dorsey, 683 So. 2d 614, 617 (Fla. Dist. Ct. App. 1996).

are harmed.[103]

An interesting question is whether one could obtain strict scrutiny review under the *Smith* standard by arguing that the foreseeability standard is *not* neutral law, but rather inherently biased against religious belief by presuming that only a secular perspective is reasonable. In other words, if a person makes an assessment of the risk in a situation based on a sincerely held religious belief (e.g., giving a priest a second chance because one believes that he has been reformed through the intervention of God through a sacrament), is that belief inherently unreasonable under the law? Thus, while negligence can operate against the Church so long as it is neutral and generally applicable, an argument could be made that the particular *standard* of foreseeability under the law of Oregon is biased against religion. Of course, this too, like the previous discussion about the efficacy of juries, ignores the fact that it will always be a jury—made up, presumably, of a cross-section of the community, including people of religious faith—that makes the determination as to what is reasonable. Again, we ask juries to make these kinds of subjective decisions all the time. It seems not a stretch, and certainly no infringement on religious liberty, for a jury to decide whether a particular decision, even made for religious reasons, was unreasonable under the circumstances.

C. Confidentiality: The Issues of Religious Liberty that Arise from the Confessional, Sub-Secreto Files, and Medical and Psychological Records

Oregon's clergy-penitent privilege is quite broad and contains no explicit limiting language regarding when a discussion involving a clergy member is not privileged.[104] It comes into play generally to protect any communication between bishops and

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[103] According to Nugent:

> Even if the behavior is religiously based, neutral laws of general application do not violate the First Amendment. But "[a] law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest"; the court will apply strict scrutiny to determine whether the law violates the First Amendment. Consequently, if the conduct being regulated is religiously based, the court must identify the law's purpose and function.

Nugent, *supra* note 101, at 973 (2003) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-32, 546 (1993)) (footnotes omitted).

[104] Codified in ORS 40.260, the privilege reads in relevant part:

> (1)(a) "Confidential communication" means a communication made pri-

priests, including discussions concerning investigations or discipline. It also operates in two secondary ways: (1) to protect the church's secret personnel files on priests when sought in discovery, and (2) to protect the records of an abusive priest's psychological counseling that are given to and retained by the Church.

1. The Clergy-Penitent Privilege Generally

The clergy-penitent privilege has been summarized as "embracing any 'confession by a penitent to a minister in his capacity as such to obtain such spiritual aid as was sought and held out in this instance'"[105] The Church has used this privilege to argue that virtually all communications between a bishop and abusive priests or those priests who witness clergy abuse by their peers are confidential and protected from discovery.[106] However, Oregon's clergy-penitent privilege does not sweep nearly so broadly.

> vately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.
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> (1)(b) "Member of the clergy" means a minister of any church . . . who in the course of the discipline or practice of that church . . . is authorized or accustomed to hearing confidential communications and, under the discipline or tenets of that church . . . has a duty to keep such communications secret.
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> (2) A member of the clergy may not be examined as to any confidential communication made to the member of the clergy in the member's professional character unless consent to the disclosure of the confidential communication is given by the person who made the communication.
>
> (3) Even though the person who made the communication has given consent to the disclosure, a member of the clergy may not be examined as to any confidential communication made to the member in the member's professional character if, under the discipline or tenets of the member's church, denomination or organization, the member has an absolute duty to keep the communication confidential.

OR. REV. STAT. § 40.260 (2005).

[105] Mockaitis v. Harcleroad, 104 F.3d 1522, 1532 (9th Cir. 1997) (quoting Mullen v. United States, 263 F.2d 275, 277 (D.C. Cir. 1959)).

[106] In a memorandum opinion, one bankruptcy court for the District of Oregon stated:

> Archbishop Levada also seeks a ruling that he is entitled to raise numerous privilege objections, including objections based on Oregon's clerical privilege . . . .
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> . . . [The court has] rejected the argument that Oregon's privilege for communications with clergy, set forth in OEC 506(2), applies to all confidential communications with clergy. The rule requires that the communication with clergy be "in the [clergy] member's professional character," which I interpret to mean in his role as spiritual advisor.

In re Roman Catholic Archbishop of Portland, 335 B.R. 815, 836 (Bankr. D. Or. 2005).

Plainly, Oregon's privilege was not designed to be limited to communications in the Roman Catholic sacrament of reconciliation, otherwise known as confession.[107] Its terms are much more generous. While *State v. Cox*[108] is the only Oregon case applying the privilege in significant detail, other state courts have applied it under circumstances involving allegations of sexual abuse.[109]

Undoubtedly confidential communications that fall within the scope of Oregon's clergy-penitent privilege are made in the course of any priest's duties. No one in any civil abuse case on record in Oregon, as far as is known, has argued that the very central and, to Catholics, sacred rites of the confessional should be subject to discovery in abuse cases. However, not all communications to or from a priest are protected by the clergy-penitent privilege, and no communications about a priest to other church employees or agents, such as mental health workers, are protected since only confidential, spiritual communications are protected by the privilege. In the bankruptcy case involving the Archdiocese of Portland, an issue arose about deposing a former Archbishop now on assignment at the Vatican. Lawyers for the bishop argued fiercely—reading the privilege most broadly—that many questionable areas should be off-limits.[110] Not surprisingly, these arguments were rejected by the court in favor of a more commonsense reading of the privilege.

2. Sub-Secreto Files

Priest discipline files are held in confidential files, usually located in a separate area from the rest of Church records. The keeping of these files is mandated by Canon Law[111] and is driven by a concern that delicate details of a priest's life, problems, and medical issues should not be on display to any secretary or janitor who happens to stumble onto regular personnel files.

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[107] *See* State v. Cox, 87 Or. App. 443, 445-48, 742 P.2d 694, 695-97 (1987) (holding that admission of Mormon clergyman's testimony about defendant's confession violated clergy-penitent privilege and required reversal of defendant's conviction).

[108] *Id.*

[109] *See, e.g.*, People v. Campobello, 810 N.E.2d 307 (Ill. App. Ct. 2004).

[110] *See* Archbishop Levada's Reply to Tort Claimant's Response to Motion to Modify Subpoena, *In re* Roman Catholic Archbishop of Portland, 335 B.R. 815 (Bankr. D. Or. 2005) (raising arguments that the requested discovery was barred by: (1) the Federal Sovereign Immunities Act, (2) the Doctrine of Comity, (3) the Law of the Holy See as Applicable under Oregon Choice-of-Law rules, (4) Oregon's clerical privilege, and (5) federal governmental privilege).

[111] *See supra* note 14.

However, over time, these sub-secreto files have come to be a place where the Church administrators would put information about accusations of misconduct against a priest out of a stated concern that the material could cause scandal.[112] Eventually, the Church began to refuse to release these sub-secreto files in discovery, claiming they were privileged under the clergy-penitent privilege.[113]

Yet the personnel records of a tortfeasor, whether clerical or layperson, are absolutely within the scope of discovery in civil litigation in Oregon.[114] And the right to discovery in Oregon is broad and liberally construed.[115] Indeed, the Oregon Supreme Court directs trial courts to be liberal in compelling inspection of nonprivileged documents.[116] No privacy privilege—certainly no

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112 This use of the diocesan secret archives to hide accusations of priest abuse is arguably a distortion of the bishops' power to "determine that other materials or documents be stored [in the secret archives] because of their sensitive or secret nature or because dissemination or revelation of them could seriously damage an individual's reputation or cause scandal within the community." BEAL ET AL., *supra* note 14, at 643 (footnotes omitted).

113 *See* Roman Catholic Archbishop of L.A. v. Superior Court, 32 Cal. Rptr. 3d 209, 226 (Ct. App. 2005) (citing People v. Campobello, 810 N.E.2d 307, 311-12 (Ill. App. Ct. 2004)) (holding that Catholic diocese must comply with government subpoena in sexual assault prosecution against priest, even if Canon 489 requires bishop to maintain secret archive for files relating to internal Church discipline); Soc'y of Jesus of New England v. Commonwealth, 808 N.E.2d 272, 279-80 (Mass. 2004) (holding that state could subpoena personnel file of priest charged with sexual assault even if such disclosure would inhibit "communications that are necessary to maintain the Jesuits' relationship with one of its own priests"); Commonwealth v. Stewart, 690 A.2d 195, 201-02 (Pa. 1997) (holding that criminal defendant's compelling interest in fair trial outweighed Catholic diocese's claim to withhold documents deemed confidential under Canon Law because "the burden on the Diocese's religious freedom furthers a compelling governmental interest by the least restrictive means available").

114 The *Oregon Rules of Civil Procedure* (ORCP) provide:

> For all forms of discovery, *parties may inquire regarding any matter, not privileged, which is relevant to the claim or defense* of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

OR. R. CIV. P. 36B. (1) (emphasis added).

115 *See* Vaughan v. Taylor, 79 Or. App. 359, 365 n.7, 718 P.2d 1387, 1391 n.7 (1986) (quoting CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2001 (1st ed. 1970)).

116 State *ex rel*. Thesman v. Dooley, 270 Or. 37, 42, 526 P.2d 563, 566 (1974) (ruling on former discovery rules prior to adoption of ORCP 36B).

privilege recognized in Oregon—protects routine personnel files of a tortfeasor from disclosure, no matter what label they carry.[117] Because Oregon Rules of Civil Procedure (ORCP) Rule 36 is nearly identical to its federal counterpart, Federal Rules of Civil Procedure (FRCP) Rule 26, courts have applied federal law interpreting the federal discovery rule when Oregon law is silent on a point.[118] Under federal law, personnel files are discoverable and must be produced when relevant or when tending to lead to relevant evidence.[119] The existence of documents corroborating child abuse or showing evidence of similar problems in a priest's file is most certainly relevant to a child abuse victim's cause of action. The fact that Church administration would like to keep such documents confidential by claiming they are akin to information gained in the sacred confessional is beside the point. The information in these files is not given in a confessional context or even usually in a context that triggers the protections of Oregon's broad clergy-penitent privilege; accordingly, these files deserve no more protection than employee files of any other institution.

Although Oregon case law has little in the way of discussion on discovery of "secret" Church files, other jurisdictions have examined discovery of sub-secreto files in some depth. In *People v. Campobello*,[120] the State of Illinois sought documents from the Roman Catholic Diocese of Rockford in the prosecution of a priest for child sex abuse.[121] The Church asserted the clergy-penitent privilege, but the Illinois Appellate Court rejected this application of the privilege, holding that it applied only to statements constituting admissions or confessions for the purposes of

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117 *See generally* OR. REV. STAT. §§ 40.225-.273 (2005) (listing privileges in Oregon).

118 *See* Wilson v. Piper Aircraft Corp., 46 Or. App. 795, 799, 613 P.2d 104, 106 (1980) (recognizing the similarity between ORCP 36 and FRCP 26 and applying federal decisions regarding protective orders). The Oregon Supreme Court recognizes that it was the intention of the Oregon Legislature to bring Oregon procedural law, including the law of discovery, into line with the Federal Rules of Civil Procedure. *State ex rel. Thesman*, 270 Or. at 42, 526 P.2d at 566 (citing Richardson-Merrell, Inc. v. Main, 240 Or. 533, 537, 402 P.2d 746, 748 (1965)).

119 Ragge v. MCA/Universal Studios, 165 F.R.D. 601, 604-05 (C.D. Cal. 1995) (ordering production of personnel files and noting that defendant had identified no case law supporting the proposition that personnel files are privileged); Ladson v. Ulltra E. Parking Corp., 70 Fair Empl. Prac. Cas. (BNA) 140, 141 (S.D.N.Y. 1996) (holding that no privacy privilege protects against disclosure of personnel files).

120 810 N.E.2d 307 (Ill. App. Ct. 2004).

121 *Id.* at 311.

spiritually counseling or consoling individuals.[122]

Similarly, in *Commonwealth v. Stewart*,[123] a defendant charged with murdering a priest subpoenaed documents kept in the secret archives of a Roman Catholic diocese.[124] After the Church raised the clergy-communicant privilege, the court required an in camera review of the documents.[125] The court went on to hold that the documents were discoverable with the exception of confessional information.[126] In rejecting the Allentown Diocese's attempted application of the privilege, the court noted, "[n]early every jurisdiction in the United States has recognized a clergy-communicant privilege and, like Pennsylvania, requires the communication to have been motivated by penitential or spiritual considerations."[127] The Pennsylvania court also specifically rejected the diocese's argument that the privilege should extend to communications based solely on a clergyman's religious status, observing that such an interpretation would "effectively extend the privilege to communications involving entirely secular concerns."[128]

However, whatever the reasons behind the different courts' requirements of in camera review, the effect is a positive one for victims of sexual abuse. This is particularly true when one considers the difference in the nature of information spoken within the walls of a confessional booth and that memorialized in writing in church archives. Moreover, courts have rightly gone out of

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[122] The Appellate Court of Illinois said:

> In our view, the clergy member privilege extends only to information that an individual conveys in the course of making an admission or confession to a clergy member in his capacity as spiritual counselor. We reject the Diocese's suggestion that a clergy member's "professional character" is broader than his role as "spiritual advisor" under [the statutory privilege].

Id. at 320.

[123] 690 A.2d 195 (Pa. 1997).

[124] *Id.* at 196.

[125] *Id.* at 201-02. The in camera review was ordered in part because the diocese's motion to quash did not describe what information contained in the documents was obtained in secrecy by a church official acting as a spiritual advisor to the murdered priest. *Id. See also* Niemann v. Cooley, 637 N.E.2d 943, 949-50 (Ohio Ct. App. 1994) (ordering in camera inspection of archdiocese files); Hutchison v. Luddy, 606 A.2d 905, 908-10 (Pa. Super. Ct. 1992).

[126] *Stewart*, 690 A.2d at 201.

[127] *Id.* at 198.

[128] *Id.* at 200; *see also* Roman Catholic Diocese of Jackson v. Morrison, 2003-IA-00743-SCT (¶¶ 116-17) (Miss. 2005) (holding that priest-penitent privilege was not applicable to documents "clearly not directed to anyone in their 'professional character as spiritual adviser'").

their way to avoid any chilling effect by reassuring churches and clergy that the in camera review process provides adequate protections by allowing church representatives to make relevancy, privilege, and confidentiality arguments.[129] Finally, it is important to note that not all courts have allowed such broad discovery and in camera review of church documents. Rather, discovery requests of religious organizations have been successfully quashed in state courts with surprising frequency, despite the negative effects that such decisions have on past and potential future victims of clergy sexual abuse.[130]

By its terms, the clergy privilege should be limited in all cases to those disclosures made about a spiritual matter while the recipient of the disclosure is under an obligation of secrecy. Churches have no legitimate privacy interest in protecting their documentary records of abuse by employee-clergy. In assessing claims of clergy privilege, courts rightly tend to keep in mind the policy rationale behind the privilege. The clergy-penitent privilege was meant to benefit society by allowing individuals to seek absolution and spiritual guidance, not protect churches from liability for the sexual abuse of their ministers.[131] The courts have been justifiably reluctant to extend the clergy-penitent privilege to all conversations among religious members or clergy.[132]

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[129] *Stewart*, 690 A.2d at 202.

[130] For example, in *Rosado v. Bridgeport Roman Catholic Diocesan Corp*., when the plaintiffs sought deposition of the abusive priest and two of his bishop-supervisors, the court issued a protective order. 825 A.2d 153, 179 (Conn. App. Ct. 2003) (citing Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32-33 (1984)), *rev'd on other grounds and remanded*, 884 A.2d 981 (Pa. 2005). On appeal, the court ultimately upheld the protective order. *Id*. at 187. *See also* Jeffrey Hunter Moon, *Protection Against the Discovery or Disclosure of Church Documents and Records*, 39 CATH. LAW. 27 app. at 52-54 (1999) (collecting cases holding that diocese records are not discoverable in civil trial).

[131] Trammel v. United States, 445 U.S. 40, 51 (1980) ("The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.").

[132] Consider the holdings in a local case, *In re Roman Catholic Archbishop of Portland*, 335 B.R. 815 (Bankr. D. Or. 2005). There, in the course of a Chapter 11 bankruptcy case, the court was faced with an adversary proceeding brought to recover for the alleged negligence of the archdiocese in dealing with earlier allegations of sexual misconduct by its priests. *Id.* at 820-21. The court held that it could rightfully depose witnesses regarding: (1) the archdiocese's policies and practices in handling sexual misconduct by priests against minors, including incidents occurring after the last date of abuse alleged by complainants, and (2) internal church organization and practices that affected the pattern, practice, and policies regarding allegations of sex abuse. *Id.* at 821-25. The court went on to rule that the clerical privilege under

3. Medical and Psychological Treatment Records

The use of mental health professionals by the Church to evaluate priests accused or acknowledged to have abused a child has been a standard and sometimes controversial practice for decades.[133] Of course, these processes do not usually represent a communication by a penitent to a clergy member—even if the priest is considered as the penitent—unless the psychologist or psychiatrist is a clergy member and the communications are intended to be confidential as part of a confessional rite. This is not usually the scenario that has transpired in treatment settings.

The questions get more interesting when the reports or records of treatment are sent to third parties, say a supervising bishop or superior. Indeed, in *Fearing v. Bucher*, one of the most hotly contested issues on remand before trial was the discoverability of treatment records of the accused priest.

As a general rule, evidentiary privileges do not apply when a communication that would otherwise be privileged is intentionally relayed to a third party.[134] For example, in situations where

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Oregon law only protected communications made to clergy in furtherance of spiritual advice. *Id.* at 827, 829-30. As such, the court held that the complainants could not depose a former archbishop about his activities and communications while serving on a confidential religious body at the Vatican. *Id.* at 834-36. This result in *Archbishop of Portland* is ironic in that the potential for serious negative effects on free exercise of religion was much more likely in the areas in which the court allowed discovery than it was in the area in which the court barred discovery.

133 For an interesting overview of the Catholic Church's use of treatment centers for sexually abusive priests, see Barry Werth, *Fathers' Helper*, NEW YORKER, June 9, 2003, at 61. For an in-depth look at the advent, use, and abuse of the Catholic Church's treatment centers for sexually abusive priests, see A.W. Richard Sipe, *Preliminary Expert Report*, http://www.richardsipe.com/reports/sipe_report.htm (last visited Oct. 23, 2006) (discussing, in part, the "fusion of psychiatry/psychology and the opening of Catholic treatment centers"). For a case study about the procedures and problems of Catholic treatment centers for sexually abusive priests, see Steve McGonigle, *Diocese Was Silent on Accused Priests: Amarillo Bishops Hired 8 Pastors from Church-Run Treatment Centers*, DALLAS MORNING NEWS, Jan. 19, 2004, *available at* http://www.bishop-accountability.org/usccb/natureandscope/dioceses/amarillotx.htm.

According to Steve McGonigle:

> [The bishop] said he hid the truth about . . . priests hired from treatment programs as part of an after-care program intended to keep them from committing new offenses. The priests also were required to meet monthly with the bishop, return to [the treatment center] every six months, attend a support group headed by a psychologist and receive individual counseling . . . .

Id.

134 Oregon Evidence Code Rule 511 provides that the holder of a privilege "waives the privilege if the person . . . voluntarily discloses or consents to disclosure

a priest is asked by his superiors to receive a psychological assessment, the priest is usually asked to sign a waiver so that his superiors can receive a report. The act of signing the waiver has the legal effect of demonstrating the priest's intention that the report be relayed to a third party. As such, the priest goes into the psychological evaluation and treatment knowing that it will be relayed to his employers, and consequently the results of the evaluation and subsequent treatment are not privileged under most states' psychotherapist-patient privilege.[135]

Likewise, in considering the application of this privilege it is important to note that under Oregon law, by definition a communication is not "confidential" if it is intended to be relayed to third parties to whom the privilege or another privilege does not apply.[136] Thus, like the scenario mentioned above, the psychotherapist-patient privilege is not implicated when a priest seeks

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of any significant part of the matter or communication." OR. EVID. CODE Rule 511 (codified at OR. REV. STAT. § 40.280 (2005)). There is no "limited waiver" of a privilege under Oregon law. *See* State v. Moore, 45 Or. App. 837, 843, 609 P.2d 866, 869 (1980) (rejecting state's attempt to carve out a limited waiver of the attorney-client privilege).

[135] Oregon's psychotherapist-patient privilege reads in relevant part:

> (1)(a) "Confidential communication" means a communication not intended to be disclosed to third persons except:
>
> > (A) Persons present to further the interest of the patient in the consultation, examination or interview;
> >
> > (B) Persons reasonably necessary for the transmission of the communication; or
> >
> > (C) Persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.
>
> (1)(b) "Patient" means a person who consults or is examined or interviewed by a psychotherapist.
>
> (1)(c) "Psychotherapist" means a person who is:
>
> > (A) Licensed, registered, certified or otherwise authorized under the laws of any state to engage in the diagnosis or treatment of a mental or emotional condition; or
> >
> > (B) Reasonably believed by the patient so to be, while so engaged.
>
> (2) A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purposes of diagnosis or treatment of the patient's mental or emotional condition among the patient, the patient's psychotherapist or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

OR. EVID. CODE Rule 504(1)-(2) (codified at OR. REV. STAT. § 40.230 (2005)).

[136] *Id.* at 504(1)(a).

treatment from a psychologist for the purpose of having the report and the communications relayed to his superiors.

In conclusion, it is clear that the psychotherapist-patient privilege does not apply to psychological assessments required by a clergy's superiors if the findings, evaluations, or recommendations of the treatment are shared with the employer-diocese or religious order. Not only is this the current law, it is also good policy, as noted by the Washington Supreme Court in rejecting a similar effort to extend the psychotherapist-patient privilege to records in an accused priest's personnel file:

> Legislative grants of testimonial privilege conflict with the inherent power of the courts to compel the production of relevant evidence and are, therefore, strictly construed.
>
> Even were we inclined to recognize a unity of interest between a cleric and his or her church and protect communications made in furtherance of that interest against compulsory disclosure, this is not the case in which to do so. Where childhood sexual abuse is at issue, even long established privileges do not apply.[137]

D. Imposing Punitive Damages Against the Church

Punitive damages play an important role in tort law. With an institution as large as the Catholic Church, the argument goes, the only way to enforce systematic change that will stop the widespread pattern of abuse is to force the Church to take notice.[138] Punitive damages force the Church to take notice by imposing a serious financial punishment that deters the Church from failing to remedy those elements of its internal structure that have incubated a culture of abuse. Nevertheless, while punitive damages may generally be an accepted, though politically controversial, remedy of tort law, even the possibility of imposing punitive damages on religious institutions is a relatively new notion,[139]

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[137] C.J.C. v. Corp. of the Catholic Bishop of Yakima, 985 P.2d 262, 271 (Wash. 1999) (en banc) (citations omitted). *See also* Niemann v. Cooley, 637 N.E.2d 943, 952 (Ohio Ct. App. 1994) (holding that no privilege was present when a priest's counseling with a psychologist or psychiatrist was not for treatment but for the Archdiocese to determine his future as a priest).

[138] This is particularly true when an institution is large enough that it has the resources and power to pay off each individual claimant in settlement rather than change its internal policy or practice.

[139] Two law professors made this observation:

> At the beginning of the twentieth century, a person sexually molested by someone acting on behalf of a religious organization would not have contemplated legal action against the religious organization and would not

and not without reason to give pause.

Historically, the imposition of punitive damages against a church, or any other damages for that matter, was barred by the doctrine of charitable immunity.[140] Today, despite a momentary resurgence in the late 1980s and early 1990s,[141] the charitable immunity doctrine has been almost completely dissolved. Since this abrogation of the charitable immunity doctrine,[142] churches have

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> have been successful in such an action had she tried. By the beginning of the twenty-first century, however, a person who had suffered such an injury might well be a successful plaintiff in a suit against the wrongdoer, the ecclesiastical officials, and the religious entity in which the individual defendants served.

Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1797-98.

[140] The American version of the charitable immunity doctrine arose out of several English court decisions. *E.g.*, McDonald v. Mass. Gen. Hosp., 120 Mass. 432, 434-36 (1876); Perry v. House of Refuge, 63 Md. 20, 26-28 (1885). Ironically, both of these cases were already overruled in English law by the time they were adopted in the United States. Lupu & Tuttle, *supra* note 139, at 1798 n.23 (citing Janet Fairchild, Annotation, *Tort Immunity of Nongovernmental Charities—Modern Status*, 25 A.L.R. 4th 517, 522-23 (1983)).

More history shows that

> [t]he doctrine was eventually adopted by nearly all American jurisdictions, either by judicial decision or statute. Charitable immunity rested on a number of policy grounds, including a notion of implied trust limiting the uses of the organization's funds to its charitable purposes, and a theory that beneficiaries of such services implicitly waived their right to sue in tort over injuries suffered as a result of receiving the services.

Id. (citing WILLIAM W. BASSETT, Religious Organizations and the Law §§ 7.2-.6 (2003)).

[141] A decade ago, it was noted that the pendulum of tort liability may have been swinging in the other direction:

> More recently, a trend toward affording charities greater immunity has re-emerged. This trend is the result of rising insurance premiums, the reduced insurance coverage characteristic of the 1980s, and several high-profile cases imposing enormous liability on nonprofit corporations. However, legislatures and courts generally disagree on the extent of liability that nonprofit corporations should be forced to bear, and the law around the country is currently in a state of disarray.

Daniel A. Barfield, Note, *Better to Give Than to Receive: Should Nonprofit Corporations and Charities Pay Punitive Damages?* 29 VAL. U. L. REV. 1193, 1196-97 (1995) (footnotes omitted).

[142] The abrogation of the doctrine has been described as

> [f]irst, a general decline in the doctrine of charitable immunity has made possible a wide array of tort claims against religious organizations. Under this doctrine, which held sway in American courts from the late nineteenth through the mid-twentieth centuries, nonprofit organizations were immune from liability for torts that they or their agents committed against beneficiaries of their services. By the early 1960s, charitable immunity was quickly eroding, especially with respect to medical malpractice claims

continued to fight with vigor the imposition of punitive damages in clergy abuse cases:

> [R]eligious organizations are fighting the imposition of punitive damages in clergy abuse cases. . . . The benefit of the damages lies in their power to deter future bad behavior and to punish the person for their wrongful action. In the case of imposing punitive damages against the Catholic Church for the tortious actions of abusive priests, the justification is the same as that of any other master/servant relationship: "the imposition of punitive damages upon the employer serves as a deterrent to the employment of unfit persons for important positions."[143]

There are three general arguments that are made in opposition to the imposition of punitive damages on a religious organization. The first is that churches will always seek to avoid punitive damages by attempting to avoid the claims that most often lead to the imposition of punitive damages altogether. Obviously, such attempts will run the gamut of procedural and statutory allegations of shortcomings in the plaintiff's claim[144] as well as ar-

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> against nonprofit hospitals. In most states, the erosion was complete by the mid-1980s. Policy reasons for the shift are not hard to fathom: the culture had come to expect a legal remedy for nearly every injury, and institutions seemed better able than the injured parties to absorb—or to purchase insurance to cover—the costs of such injuries.

Lupu & Tuttle, *supra* note 139, at 1798-99 (footnotes omitted).

143 Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1167-68 (footnotes omitted) (quoting RESTATEMENT (SECOND) OF TORTS § 909 cmt. b (1979)).

144 *See* Roman Catholic Diocese of Covington v. Secter, 966 S.W.2d 286, 291 (Ky. Ct. App. 1998). In *Secter*, a young man brought suit against the diocese for sexual abuse he suffered at the hands of a priest at his Catholic school. *Id.* at 287. On appeal, the diocese argued against the imposition of punitive damages. The diocese reasoned that the malice or oppression necessary to support punitive damages could not be proven against the diocese because the diocese did not know about the abuse nor did the diocese have any reason to believe that this plaintiff would be abused rather than another boy his age. *Id.* at 291. The court ultimately rejected the diocese's argument and upheld the punitive damages award of $700,000. *Id. See also* Isely v. Capuchin Province, 880 F. Supp. 1138, 1159 (E.D. Mich. 1995) (holding that the issue of punitive damages against the "non-abusing" defendant church should not be submitted to the jury because: (1) under Wisconsin law, punitive damages are only "available when the defendant acts in wanton, willful, or reckless disregard," and (2) the plaintiff failed to meet the clear and convincing evidence standard); Hutchison *ex rel.* Hutchison v. Luddy, 742 A.2d 1052, 1059 (Pa. 1999). In *Hutchison*, a retarded boy was continually molested by a priest and later brought suit for instances of abuse that were not barred by the statute of limitations. *Id.* at 1053-54. The incidents occurred in a motel off of the church property. *Id.* At the end of the trial, the jury awarded punitive damages of over one million dollars. *Id.* at 1054. The defendants appealed to the Superior Court of Pennsylvania, which

guments that the underlying case involved is barred by the First Amendment.[145]

The second argument is that the imposition of punitive damages on a church is ultimately against the weight of public policy. Those cases where a religious organization has argued that public policy prohibits the court from imposing *any* punitive damages have generally been unsuccessful. One example is *Mrozka v. Archdiocese of St. Paul & Minneapolis*,[146] a case brought by one of many victims of a sexually abusive priest. The jury held for the plaintiff, awarding damages that included $2.7 million in punitive damages.[147] On appeal, the defendant Archdiocese argued that awarding punitive damages against a religious organization was contrary to public policy.[148] In making this argument, the Archdiocese cited *City of Newport v. Fact Concerts, Inc.*,[149] arguing that the same public policy concerns existed in its case.[150] That is, punishment would not be an effective deterrent because the damages would be inflicted on an innocent entity rather than on the wrongdoers.[151] The court disagreed, finding that the decision in *City of Newport* turned on congressional intent, which was not questionable in the case at hand.[152]

While arguments in attempt to bar all punitive damages against religious institutions have been unsuccessful, some policy arguments have succeeded in restricting the amount of punitive damages in particular circumstances. Thus, in *Bredberg v. Long*,[153] the court allowed punitive damages against a religious organization but not against its founders who were also sued in

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reversed the jury's award, finding that the plaintiff had failed to demonstrate the necessary control to impose liability for respondeat superior. *See* Hutchison *ex rel.* Hutchison v. Luddy, 763 A.2d 826, 836-45, 853 (Pa. Super. Ct. 2000). The supreme court reversed the superior court's order and reinstated the jury's award of punitive damages. *See* Hutchison *ex rel.* Hutchison v. Luddy 870 A.2d 766 (Pa. 2005). The court found that the bishop and archdiocese's "inaction in the face of such a menace is not only negligent, it is reckless and abhorrent." 742 A.2d at 1059.

145 *See* Schwartz & Lorber, *supra* note 22. **R**

146 482 N.W.2d 806, 809 (Minn. Ct. App. 1992).

147 *Id.* at 810.

148 *Id.*

149 453 U.S. 247, 271 (1981) (holding that punitive damages could not be awarded against a municipality).

150 *Mrozka*, 482 N.W.2d at 810.

151 *Id.*

152 *Id.* at 810-11. The court also noted that "punitive damages have been allowed against religious organizations in other jurisdictions." *Id.* at 811.

153 778 F.2d 1285 (8th Cir. 1985).

their personal capacity.[154] The court's decision was based on the public policy implications raised by imposing punitive damages against insolvent individuals rather than the fact that the organization was religious:

> Punitive-damages awards must not exceed the level necessary properly to punish and deter. As we recently stated . . . "[W]e can see neither the justice nor sense in affirming a verdict which cannot possibly be satisfied. The purpose of punitive damages is to punish [the wrongdoer] for outrageous conduct, not to drain him of his life's blood."[155]

Therefore, the court reasoned, the punitive damages against the individual founders had to be set aside.[156] Clearly then, even if public policy arguments will not pose a complete bar to the imposition of punitive damages, arguments about exigent circumstances, such as insolvency, can still act as a serious restraint on a plaintiff's ability to recover for sexual abuse.

The third and final general defense against the imposition of punitive damages most often raised by religious institutions is comprised of constitutional arguments, particularly Establishment Clause, Free Exercise Clause, and hybrid arguments. As far as Establishment Clause arguments are concerned, churches usually allege that the investigation by the court (or other government agency) required in order to impose punitive damages would lead to excessive entanglement with religion in violation of the First Amendment.[157] However, these types of arguments are rarely successful, particularly because the level of scrutiny necessary to impose punitive damages is rarely more invasive then that required to impose compensatory damages.[158] In other

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[154] *Id.* at 1290.

[155] *Id.* (citations omitted) (alterations in original).

[156] *Id.*

[157] The *Lemon* test, enunciated in *Lemon v. Kurtzman*, requires that government action: (1) must have a legitimate secular purpose, (2) must not have the primary effect of either advancing or inhibiting religion, and (3) must not result in an "excessive entanglement" of the government and religion. 403 U.S. 602, 612-14 (1971).

[158] For example, in *Mrozka v. Archdiocese of St. Paul & Minneapolis*, the archdiocese argued that the imposition of punitive damages would violate the Establishment Clause because the level of government inquiry into the reasonableness of the archdiocese's actions would amount to excessive entanglement. 482 N.W.2d 806, 811-12 (Minn. Ct. App. 1992). The court rejected this argument:

> Here, the Church has conceded that an examination of the reasonableness of its actions and the bases for its decisions regarding the placement and discipline of [the abusive priest] is constitutionally allowable for purposes of determining negligence and compensatory damages. We cannot say that

words, most courts have found that if the court has the authority under the Constitution to hear the underlying claim in a particular case, it is unlikely that the additional consideration of punitive damages will unconstitutionally infringe on the religious institution's First Amendment rights.[159] However, it is important to note that some courts have been persuaded by these types of Establishment Clause arguments.[160]

> examination of these same matters with regard to the possible imposition of punitive damages constitutes excessive entanglement.

Id. at 812.

[159] Bollard v. Cal. Province of the Soc'y of Jesus, No. C 97-3006 SI, 1998 WL 273011, at *5 (N.D. Cal. May 15, 1998), *rev'd*, 196 F.3d 940 (9th Cir. 1999). *Bollard* was a sexual harassment case where the plaintiff alleged wrongful constructive termination from candidacy for the priesthood. 1998 WL 273011, at *1. In its discussion, the trial court stated:

> The prospect of punitive damages, designed to change defendants' conduct of Formation, would also involve the Court in an unconstitutional intrusion into the relationship between the Society of Jesus and its clergy. . . .
>
> . . . .
>
> The Court concludes that the "ministerial exception" to Title VII and the Establishment Clause's concern with the "entanglement" and interference of federal government in church autonomy prohibit the Court from exercising jurisdiction over the present case.

Id. at *5. However, the Ninth Circuit eventually reversed that decision, finding that

> the scope of the ministerial exception to Title VII is limited to what is necessary to comply with the First Amendment. . . .
>
> In this case, as in the case of lay employees, the Free Exercise rationales supporting an exception to Title VII are missing. The Jesuits do not offer a religious justification for the harassment Bollard alleges; indeed, they condemn it as inconsistent with their values and beliefs. There is thus no danger that, by allowing this suit to proceed, we will thrust the secular courts into the constitutionally untenable position of passing judgment on questions of religious faith or doctrine. The Jesuits' disavowal of the harassment also reassures us that application of Title VII in this context will have no significant impact on their religious beliefs or doctrines.

196 F.3d at 947.

[160] Schmidt v. Bishop, 779 F. Supp. 321, 332 (S.D.N.Y. 1991). In *Schmidt*, the plaintiff brought suit against her pastor, who initiated inappropriate sexual conduct with her after she enrolled in counseling with him in 1960 when she was twelve. *Id.* at 324. The plaintiff left the church seventeen years later but remained in counseling under the defendant-pastor until 1989, when the plaintiff was in her early forties. *Id.* The plaintiff left counseling after she began psychotherapy and realized that the pastor had been sexually abusive. *Id.* Here again, the defendants raised the First Amendment as a defense to the case as a whole. *Id.* at 332. Interestingly, the court found that any imposition of damages would have a "chilling effect" and violate the First Amendment, specifically the Establishment Clause:

> [A]ny inquiry into the policies and practices of the Church Defendants in hiring or supervising their clergy raises . . . First Amendment problems of entanglement . . . . Church governance is founded in scripture, modified by reformers over almost two millenia. . . .

A second type of constitutional argument often made in opposition to punitive damages is that allowing such damages against religious institutions would unreasonably infringe upon the religious actor's right to freely exercise one's religion. Under the *Smith*[161] standard for a Free Exercise claim, a church making such an argument must make one of two showings. The first is that the imposition of punitive damages is occurring under a law that is not neutral or generally applied.[162] The second is that there is a "hybrid" right that would be violated by the imposition of punitive damages.[163] If the Church succeeds in showing either of these, the burden then shifts to the government to show that the imposition of punitive damages is necessary to achieve a compelling state interest. While some courts have been persuaded by such arguments, most Free Exercise defenses to punitive damages are unsuccessful.[164]

> . . . It would therefore also be inappropriate and unconstitutional for this Court to determine after the fact that the ecclesiastical authorities negligently supervised or retained the defendant Bishop. Any award of damages would have a chilling effect leading indirectly to state control over the future conduct of affairs of a religious denomination, a result violative of the text and history of the establishment clause.

Id.

[161] Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

[162] One creative (though ultimately unsuccessful) Free Exercise argument was posed in *Mrozka*. 482 N.W.2d at 810. In an attempt to avoid a $2.7 million punitive damages award, the archdiocese argued that the state's exemption of municipalities from punitive damages (without an exemption for nonprofits or churches) was a system of individual exemption that was not neutral and applicable to all. *Id.* at 811. As such, the archdiocese argued, the state was required to extend an exemption in the cases of religious hardship unless they could prove a compelling state interest; otherwise, the law amounted to a violation of the Free Exercise Clause. *Id.* The court rejected the archdiocese's assessment of the law as less than neutral. *Id.* The court went on to state that, in the alternative, even if the exemption was not neutral, "the state's interest in protecting children from dangerous behavior is sufficiently compelling to justify any indirect burden the Church might incur by having its external actions subject to sanction." *Id.*

[163] *See* Christofferson v. Church of Scientology of Portland, 57 Or. App. 203, 251-53, 644 P.2d 577, 607-08, *review denied*, 293 Or. 456 (1982) (defendant church arguing that the imposition of punitive damages for a claim of fraud implicated both its free exercise and free speech rights).

[164] *But see* Tilton v. Marshall, 925 S.W.2d 672, 680 (Tex. 1996). In *Tilton*, the plaintiff brought suit for intentional infliction of emotional distress and fraud against a pastor and the Word of Faith World Outreach Center Church. *Id.* at 675. The claims arose when the plaintiffs sent prayer requests with donations to a televised pastor who promised that if they did so, he would pray for the individuals and their requests would be granted. *Id.* at 675-76. When the plaintiff's prayers were not all answered (including a prayer for healing of a terminally ill woman who subsequently died of cancer), the plaintiffs sued. *Id.* The defendant pastor and church objected

In the end, under most circumstances in Oregon, the Church may well be held liable for punitive damages if its actions can be said to have crossed the line drawn by Oregon's punitive damages statute, ORS 31.730: that is, the conduct constituted "reckless and outrageous indifference" to the risk of harm posed by an abusive priest.[165]

CONCLUSION

It is nearly impossible to overstate the emotional and psychological damage done to children by trusted adults who sexually abuse them. It is akin to taking a razor blade to a child's face. The scars never go away, and they permanently disfigure. The only difference in sexual abuse is that the scars are on the inside—in the mind, the emotions, the heart, and the soul. And when the abuse is perpetrated by a person of religious authority, the wounds often additionally destroy any sense of awe, wonder, and trust that produces transcendent faith of any kind—and especially a mature and robust religious faith. Additionally, when that religious authority is vested with the mantle of the near-absolute spiritual and emotional power given to Catholic priests by their communities, the children victimized by these seemingly sacred adults experience a kind of spiritual amputation. The lopped-off parts never really grow back. Even with relatively "less severe" abuse, such as fondling, or even with abuse occurring "only" once, the damage has been done. How many times does it take before a razor blade scars a face? For it is certainly true that the damage is in the betrayal as much as in the physical act. In some ways, it often seems that the survivors would have been better off, from a spiritual and mental health standpoint, if

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to the suits, which would have subjected them to punitive damages. *Id.* They argued that by inquiring into whether unanswered prayer was actionable under tort law, the court would violate the First Amendment's Free Exercise and Establishment Clauses. *See id.* at 676. When the trial court refused to grant the defendant's motion for summary judgment, the case eventually rose to the Texas Supreme Court. The Texas Supreme Court ruled that it would not permit plaintiffs to recover damages for mental anguish: "To allow mental anguish damages or punitive damages against defendants in this case would be to chill defendants [sic] free exercise of religion. A person can hardly exercise his religion freely, knowing that he may someday be required to pay mental anguish or punitive damages." *Id.* at 693 (Hecht, J., concurring in part and dissenting in part).

165 *See* Bolt v. Influence, Inc., 333 Or. 572, 578, 43 P.3d 425, 428 (2002) ("[T]he legislature intended the trial court to determine the sufficiency of evidence supporting a claim for punitive damages under the well-established 'no evidence' standard . . . .").

they had been molested by total strangers: in that instance, they would have certainly learned that the world is sometimes not a safe place in which to trust strangers. But with priests and other religious leaders, the children learn that, as it seems, they cannot trust *anyone*. This makes functioning relationships of trust, friendship, love, or faith practically unworkable. As juries are asked in such cases, how much is it worth in dollars—our system measures damages in no other way—for a person to lose the ability to love? To trust? To live in wonder and awe? To believe in anything transcendent? The answer is as troubling, difficult, and potentially as explosive as anything in the justice system.

The cost to individual lives and society of such betrayal and abuse is staggering: the damage in these young lives often begins to show early in school performance, disciplinary records, juvenile crime, and drug or alcohol abuse. Later in life it manifests itself in broken marriages, families, violence, unemployment, antisocial conduct, and criminal histories—including all too often the most heartbreaking and bizarre result of all: the survivors repeat the behavior foisted upon them by acting it out with children in their own lives, re-creating the circle of abuse and devastation. One client of ours—we will call him "Bill"—came from a troubled family and at age eight was sent to a home for such youngsters run by the Catholic Church. At age eleven he was abused by a notorious priest at the home; at age fourteen he was subjected to group abuse by other boys; at age sixteen he was coerced to engage in predatory conduct with younger boys in the priest's presence; and at eighteen he was a predator himself. He was convicted of child abuse in his early twenties and is incarcerated today, nearing the end of a two-decade sentence for child sexual crimes. In many ways, he never had a chance. How do we attempt to measure the cost to society of such a story—quite apart from the cost to Bill himself? How much has it cost to incarcerate the man all these years? How much to heal or rehabilitate all the other boys victimized by the priest or the children victimized by Bill himself? How do we count the cost of the addictions, the broken families, the lost jobs, and the domestic violence? How, indeed?

Asking such questions is not merely a rhetorical exercise. The answers must respond to the question of why an otherwise respected institution such as the Roman Catholic Church should as a matter of social policy be held responsible for the devasta-

tion done in its name. The answers must explain why the law, whether through the traditional theory of tortious negligence or the more unique Oregon-style theory of vicarious liability based on respondeat superior, is rightly used as a tool of justice and restitution for these victims. And, finally, as this Article has attempted to show, the answers must respond to objections, based on religious liberty and constitutional concerns, that the financial or religious burdens to the Catholic Church of such justice are somehow out of balance with its responsibility or the true human costs of the abuse.

Those burdens, whatever they might be, are not out of balance with the costs of abuse. As articulated at the outset of this Article, the old balancing exercise for civil liberties articulated by thinkers through Anglo-American legal history has wisely held that no civil right—including religious liberty—is absolute. Instead, these rights must be balanced against the practical reality of what it means to live in a society made up of diverse and sometimes opposing values and interests. This has surely never been truer than in the context of child sexual abuse.

But more than that, it should not be assumed, as the Church has sometimes suggested, that society's interest in protecting children from child abuse or in supporting restitution for its adult victims is at odds with the deepest values of the Catholic Church. Indeed, to the extent that the law holds the perpetrators of child abuse and the institutions that sponsored the relationships out of which the abuse occurred wholly responsible for the individual and social damage done, it echoes the words of the Lord of the Catholic Church himself, who was heard to say: "Let the little children come to me, and do not hinder them, for the kingdom of God belongs to such as these. I tell you the truth, anyone who will not receive the kingdom of God like a little child will never enter it,"[166] and "[i]t would be better for him if a millstone were hung around his neck and he were thrown into the sea, than that he would cause one of these little ones to stumble."[167] No offense is done, either to core concepts of religious liberty in the civic constitutions of our society or to the core teachings in the "constitution" of the Catholic Church, to demand that full justice be done for the crimes against children committed in the name of the Church.

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166 *Mark* 10:14-15 (New International Version).
167 *Luke* 17:2 (New American Standard Bible).